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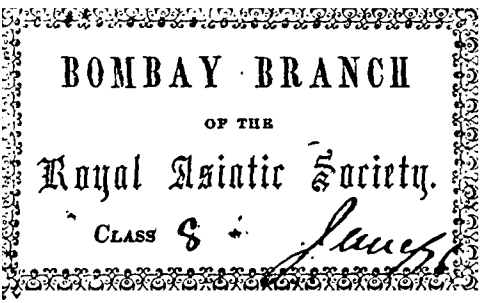

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SUPPLEMENT

TO THE

ELEMENTS OF LAW

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BY

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PREFACE TO SUPPLEMENT.

THREE Chapters, on the Transfer of Ownership, on Security, and on Succession, have been written since the publication of the second edition of the Elements of Law. In the present form they are available to those who already possess copies of either edition of that work, and will render their copies so far complete.

In the Chapter on Security I have given a sketch of the Roman law, and for this purpose have translated and abridged the twenty-second and twenty-third chapters of Professor Kuntze's Cursus des Römischen Rechts[1]. It is certainly a matter of surprise to me that English lawyers should still rely so much on French sources for their information as to Roman law. I do not wish to detract in any way from the reputation of French lawyers; but it is not rational to ignore the vast results of the learning and research which have been brought to this subject by German scholars of the last fifty years. I most earnestly recommend students of English law who desire to become acquainted with the principles of Roman law to turn towards Germany some of the attention which they have hitherto been accustomed to turn almost exclusively to France.

CALCUTTA, *July*, 1875.

[1] Cursus des Römischen Rechts, Lehrbuch für den Academischen Gebrauch, von Dr. Johannes Emil Kuntze, Professor der Rechet a.d. Universität Leipzig.

CONTENTS.

		PAGE
CHAPTER XIII.	TRANSFER OF OWNERSHIP . .	9
„ XIV.	SECURITY	30
„ XV.	SUCCESSION	55

SUPPLEMENT

TO THE

ELEMENTS OF LAW.

CHAPTER XIII.

Transfer of Ownership.

460. Transfer of ownership in its widest and most general sense covers the following subjects: voluntary transfer of ownership, involuntary transfer of ownership, and succession. Involuntary transfer of ownership, again, may be subdivided into forfeiture, transfer upon bankruptcy, transfer upon pledge, and transfer by judicial decree. Different kinds of transfer.

461. Except, however, in the case of a voluntary transfer, the event or transaction by which the transfer takes place has to be considered in other and more important aspects, and the transfer of ownership is only a subordinate incident. Thus, transfer by succession has to be considered with reference to the law of inheritance, testamentary law, and general family relations; transfer by forfeiture with reference to the criminal law; transfer by judicial decree with reference to the law of civil procedure; and so forth. This has been done to some Voluntary transfers.

extent in other parts of this book, and I shall here confine myself to the voluntary transfer of ownership.

Transfer of moveables and immoveables.

462. The voluntary transfer of ownership from one person to another may take place either as to moveables, or as to immoveables; and as this is a real distinction, and not an ideal one, it pervades all systems of law, and produces important consequences, to some of which I shall advert.

Gift, sale, and exchange.

463. The voluntary transfer may also be a sale; or it may be an exchange; or it may be a gift. But the leading principles of law applicable to all these three transactions are the same; for simplicity's sake, therefore, I shall speak, for the most part, only of a transaction which is a sale.

Transfer of ownership does not depend upon occupancy.

464. Before proceeding further, I must justify a fundamental difference in the point of view from which I am about to approach this subject, and that from which it is approached by most writers on law, especially in England. The usual method pursued is to treat the transfer of ownership as one of the modes of acquiring ownership, and to refer back *all* modes of acquiring ownership, even that by sale and purchase, for their origin and explanation, to the acquisition of ownership in a hitherto ownerless thing (*res nullius*) by what is called the natural right of occupancy[1].

Erroneous notions about occupancy.

465. Now it is quite true that nothing can be more important to a lawyer than to conceive correctly the true relation between occupancy and ownership. And far from wishing to divert attention from enquiry into this relation, I earnestly recommend the study of the Eighth Chapter of Sir Henry Maine's work on Ancient Law, the conclusions of which I shall have frequent

[1] Blackstone, Commentaries, vol. ii. p. 10.

occasion to adopt and to repeat[1]. Nor can it be doubted that (as there shewn) occupancy and ownership are very closely connected. But the assumption which is so frequently made, tacitly or openly, that universally, and at all times, the right of ownership fell to the first occupant, is, as a matter of fact, erroneous: and a method of treatment which is based upon this erroneous assumption is necessarily erroneous also, and ought to be abandoned.

Acquisition by occupancy now rare.

466. I may here also observe that although it is now considered that the ownership of a *res nullius* may be acquired by occupancy, yet this mode of acquisition, while it is insufficient for the purpose of explaining modern institutions of law, is also of small practical importance in civilised countries at the present day, for the simple reasons that things without an owner are not now very commonly found, and what few such things there are, are not generally capable of becoming the property of any one. Almost the only things in which ownership can be acquired by occupation are the products of the sea. Wild birds and wild animals on land are considered to be without an owner, until captured: but the ownership which arises on their capture does not depend upon capture alone, and is not therefore an application of the simple right of occupancy. The ownership which is obtained in this case is closely connected with the ownership of the soil where the capture takes place, and differs considerably, in the mode of its acquisition, from the ownership acquired by a person hunting without restriction over an ownerless waste, or fishing in ownerless waters[2].

[1] Blackstone's theory of property (ownership) is there discussed and shewn to be erroneous.

[2] See supra, sect. 329.

Lands originally not alienable.

467. I have still one more misconception to remove before I proceed with the consideration of the voluntary transfer of ownership. If we attend only to the present aspect of law we are very apt to speak of the free right of alienation of property as one of the so-called natural rights of man; meaning thereby that it is a right which *primâ facie* belongs to him at all times and under all circumstances: and we are thus accustomed to treat all forms, restrictions, and conditions, which have been imposed upon the exercise of the right of alienation, as so many infringements of this natural right. It is only when we come to look into the history of the matter that we find this aspect reversed. We see then that the general right of alienation which now exists has been slowly and painfully gained. It has been concluded by enquirers that, in its earlier form, ownership throughout the family of nations from which we are descended was not individual ownership at all; that ownership was not vested in individuals but in families; in other words, it was (as we should now say) corporate and not sole[1]: and alienation, which was, under such circumstances, of course difficult, was, if not altogether unknown, at least very rare.

Intervention of the public.

468. Even long after individual ownership had come to be recognised, the right of the individual owner was not considered to extend to alienation at his own will and pleasure. Either the family, or the tribe, or the state must consent to the alienation in order to render it effectual[2]. This idea is traceable in both the two most im-

[1] Maine's Ancient Law, first ed., pp. 258 sqq.

[2] The author of the Mitacshara speaks of the consent of townsmen, of kinsmen, of neighbours, and of heirs, to a transfer of land; but apparently he considers that the only consent really indispensable is that of the parties actually interested in the property;

portant forms of transfer under the Roman law. In the *mancipatio* five witnesses were required besides the actual parties to the transaction. This number is, I think, not to be referred to the imperfection of oral testimony[1], but to the requirement that the transfer should take place in the presence of and be consented to by the community at large, whom these five persons may be taken to represent. So in the case of *in jure cessio*, or transfer under judicial cognizance, I scarcely think the transaction is to be explained solely upon the ground of laxity of judicial procedure[2]; it was a public act to which superior validity attached; just as it now attaches to the judicial transfer (*gerichtliche Uebergabe*[3]) of modern German law. And the consent of the state, in which the consent of the family and of the tribe have probably merged, still plays a part, though a small one, in private transfers. It is asserted by German lawyers that their law to some extent still holds fast to the old principle that every claim to land, to be valid, must be recognised

Mitacshara, chap. i. sect. 1. verse 31. This treatise is perhaps a thousand years old (see the Preface to Colebrooke's Translation), and it is evident that a number of lingering traditions just then becoming obsolete are here alluded to.

[1] See Maine's Ancient Law, first ed., p. 204.

[2] See Maine's Ancient Law, first ed., p. 289. The notions upon which our Fine and Recovery are founded are different. These were in fact two wholly distinct proceedings, each being based on a suit, but in the former the suit was compromised by the parties, whilst in the latter it was carried on to judgment. Both were simultaneously resorted to, in order to give a complete title; their effects being different. They combine a variety of principles, limitation, warranty, and finality of judicial decision; and they have been helped out by statute. The general assertion that common recoveries are due to the decision in Taltarum's case is not borne out by the report in the Year Book, 12 Edw. IV. chap. 19.

[3] Allgemeines Landrecht, Part i. chap. 10.

by public authority[1]; and we shall see hereafter that the French law exhibits a remnant of the same idea[2].

Public policy favours alienation.

469. At the present day, wherever the rulers of a country have been animated by the desire to benefit the general community, and not any particular class, it may be said that their prevailing policy has been to render the transfer of ownership as free as possible for all descriptions of property; but there is always at work a strong counter-influence in favour of making land inalienable, coming from the comparatively small, but important and influential class, who are themselves the possessors of large landed estates. Old families and new are alike eager to attach great estates permanently to their names. The mere ownership of large estates places the whole family and descendants of the owner at once high in the social scale, and it has been no easy matter to counteract the attempts made to render such estates inalienable; for not only have contrivances of all kinds been invented with the direct object of preventing alienation, but conceptions of law have been frequently introduced for the same object, by which the very nature of ownership itself has been deeply affected[3].

Opposed by landowners.

A transfer of ownership is not a contract.

470. Having thus cleared the way, I proceed to examine the transaction by which a voluntary transfer of ownership is effected. The voluntary transfer of ownership, like every other voluntary act having legal consequences, depends on a declaration of intention coupled with the legal sanction. But a transfer of ownership cannot be viewed simply as a contract. It must be borne

[1] Bluhme, Encyclopädie, sect. 190. He speaks of judicial cognizance as taking the place of delivery; but it also takes the place of the consent of the community, and makes the transaction a public act.

[2] Pothier, Œuvres, vol. ix. p. 425, ed. Bugnet; infra, sect. 478.

[3] Supra, sect. 299.

in mind that it is of the essence of a contract that it only concerns the rights and obligations of the parties thereto, whereas it is of the essence of a transfer of ownership that it concerns the obligations, at any rate, if not the rights, but frequently both the obligations and the rights, of an unlimited number of persons. Thus, I am the owner of a piece of land of which you are the tenant, or of goods which are stored in your warehouse; and suppose that I sell this land, or these goods, to a third person without any communication with you, and that the ownership is transferred, your position is very materially affected; as tenant of the land your obligation to pay rent is due to a different person; as warehouse keeper your right to receive rent is due from a different person. So also the right to take back the goods, and to resume the land at the expiration of the tenancy, belongs to a different person. But this change of right and obligation cannot be due to contract; for between you and the third person there has been no contract at all.

It affects third parties.

471. It is true that if the only change is in the person by or to whom the obligations are due, and that there is no change in the nature of the obligations themselves, you have nothing to complain of in the transfer of ownership, provided only that you are made aware of it: what however you always do want is certain and immediate information that this transfer has taken place.

The change should be known.

472. There are many others reasons which need not be fully stated here, but which will occur to any one who considers attentively the ordinary affairs of life, why it is desirable that the ownership of property should at all times be capable of being easily ascertained. Nearly all business transactions have reference directly or indirectly to the ownership of property, and all such transactions

are perilous in exact proportion as the ownership of property is doubtful or unknown.

Publicity best secured by change of possession or delivery.

473. Now in order to secure this certainty of information as to ownership, it is before all things necessary to prevent secret transfers of property. There are, therefore, ample reasons why the law should take steps to secure the publicity of such transfers: and the surest and simplest way to do this is to require that the change of possession which a transfer of ownership contemplates should actually take place. This is the rule of law[1] which requires that delivery should accompany transfer in order to make it complete. According to this rule the declaration of intention by the parties only creates a personal obligation upon those persons *inter se*, and in order that the right *in rem*, or ownership, should be transferred, delivery must follow.

This not the origin of requirement of delivery,

474. I do not mean to affirm, nor do I consider that it would be true to affirm, that this convenient result was the origin of the celebrated, and at one time almost universal rule of law requiring delivery as a necessary element of every transfer of ownership. On the contrary, the notion which suggests delivery of the thing as an accompaniment of transfer is probably part of the original conception of ownership itself. In fact, there can be little doubt that the two ideas—transfer of the right and transfer of the thing—were originally inseparable: that is to say, persons were incapable of conceiving them separately.

[1] *Traditionibus et usucapionibus non nudis pactis dominia transferuntur;* Codex Just. Book ii. tit. 3. sect. 20. The effect of delivery and the distinction between contract and conveyance so frequently ignored may be usefully studied in Austin, Lectures, vol. ii. p. 992 sqq., third ed. The discussion is laborious and difficult, but it is complete, and will repay the labour of perusal.

Nay, so deeply is the notion of this inseparability seated that, even in modern times, we find the assertion still made[1], that this separation is impossible: an assertion easy enough to confute by existing facts, but seeing the sources from whence it comes, we may be sure that there is something more in the connection between delivery and transfer than a mere rule of convenience.

but is its present basis.

475. But though traces of the influence of other ideas as to delivery may still be found, the present basis of the requirement of delivery as an essential to the validity of a transfer of ownership is convenience alone. There is no longer any difficulty in separating the right of ownership from its enjoyment: there is no system of law under which this separation is not constantly made. Wherever, therefore, delivery is still retained, it must be as a convenient mode of publishing to the world who the new owner of the property really is.

Reasons why delivery not now necessary.

476. There are many reasons why delivery has not held its ground as a necessary condition to the transfer of ownership. Its most strenuous supporters must admit that there are many transactions in modern times to which the condition of delivery is unsuitable; and to restore it we should have to revert to a simplicity, which it would be now found impossible to maintain. Moreover, the rapidity with which it is generally desired that all business should be transacted, would render the cumbrous

[1] Heineccius, Book ii. tit. 1. sect. 239 (quoted by Austin), solemnly declares it to be a universal maxim of law that there can be no title (*jus in rem*) without tradition. He is refuted by Austin *ubi suprà*. A respectable English lawyer, Mr. Serjeant Manning, has made a similar assertion (Manning and Ryland's Reports, vol. ii. p. 568 note,); and he has been answered by Mr. Justice Blackburn (Contract of Sale, p. 189). These refutations are both interesting and instructive, but they were really not necessary; for, as the Hindoo lawyers say, 'A fact is stronger than a hundred texts.'

process of actual delivery intolerable, even where it was possible. Whether or no mankind has, upon the whole, gained or lost by the abandonment of delivery as a condition to the transfer of ownership is not, of course, a question to be considered here. At any rate the change is one which has been very widely accepted. Without going into details it may be stated generally that the law of Europe on the subject of delivery is as follows:—In England it is not required for the transfer of ownership by sale in the case of either moveable or immoveable property; nor in France; nor in Italy. In Germany delivery is still generally necessary to complete the transfer of land, and so it is in Scotland[1]. In America and the English Colonies the law upon this subject is, I believe, generally identical with the law of England. In India delivery has not generally been considered necessary either under Hindoo or Mahommedan law to a sale or pledge of moveable or immoveable property. In the case, however, of transfer by way of gift, the law of many countries requires delivery, although it is not required in the case of transfer for value.

Delivery still of great importance.

477. It is, however, desirable at once to point out, that it would be a great mistake to suppose that, because many modern systems of law no longer require delivery as absolutely necessary to complete the transfer, delivery of possession is not still a matter of very great moment in such transactions. It is a large step in legal ideas and one fraught with consequences of the highest importance to establish clearly that if I sell property to you, the property becomes yours immediately the contract is concluded;

[1] See the French Code Civil, Art. 711, 1138, 1583; Codice Civile, Art. 1448; Bluhme, Encyclopädie, sect. 177. Windscheid, Lehrbuch des Pandekten-Rechts, sect. 171. note 2. Ersk. Inst. Bk. 3. tit. 3. sect. 8; Bk. 5. tit. 3. sect. 3.

that you have not only a right to obtain the ownership, but that the ownership is actually obtained: and this is what has been established in most parts of the world. But, notwithstanding this, the ownership so obtained is, under most systems of law, in danger of being defeated in a variety of ways, if possession has not been given. Thus, for example, the absolute rule laid down in the French Code as to the completeness of the transfer without delivery exists side by side with the maxim *en fait de meubles possession vaut titre*[1]. Under the French law, therefore, ownership of moveables obtained without delivery is a most precarious one, for if a moveable thing is sold to two persons in succession, the one who first gets into possession, even although he be the second purchaser, becomes the owner, provided only that he has purchased honestly.

Publicity now generally secured by registration.

478. Where the condition of delivery has not been retained, modern legislation has generally tried to secure to some extent the necessary publicity by some other ceremonies; and one of these is generally known as *registration*. This may be described as the insertion in a public office of an account of the transaction between the parties by which the transfer takes place; which account is acknowledged by the parties before a public officer to be correct. It is generally in fact a copy of the

[1] Code Civil, sects. 1141, 2279. Austin (p. 1004), following Rogron, seems to think that by reason of this provision delivery is necessary to transfer the property in the case of moveables. But the words of the code are express, 'Elle (la vente) est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.' Art. 1583; see also Art. 1138, 'Elle (l'obligation) rend le créancier propriétaire.' The Prussian Code also gives advantages to an honest purchaser who has obtained possession; Allgemeines Landrecht, Part i. tit. 10. sect. 23.

Insinuatio: the origin of registration.

instrument executed between the parties themselves. The practice of inscribing a copy of private documents in a public register seems to have been originally introduced by the Emperor Leo in reference to gifts [1]; the object being, it is said, to enable heirs to ascertain to what claims the estate was liable before deciding whether to accept the inheritance. The proceeding was called *insinuatio*, and under that name it survived in the French law down to the time of the Code Civil [2].

Extended from gifts to pledges and transfers.

479. The requirement of registration thus established in reference to gifts seems to have been extended in the first instance to the pledge of land. The reason of this was obviously in order to supply the publicity which was wanting in a pledge; this being a transaction to which, as will be shewn hereafter, delivery was earliest resolved not to be suitable. But (as will also hereafter appear) a pledge always contemplates a sale, and, consequently, pledges and sales are very closely connected: whence we find that rules of registration are frequently extended from gifts and pledges to sales also; and in fact to all dealings with land whatsoever.

Notary.

480. The law of registration on the continent of Europe can hardly be comprehended, even generally, without advertence to an officer scarcely known in England, but who in other countries plays a very important part in all transactions of business: I mean the notary, or notary public [3]. The resort which is had upon almost all occasions in Germany, France, and

[1] Codex Just. Book viii. tit. 54. sect. 30.

[2] Pothier, Œuvres, vol. i. p. 364. ed. Bugnet.

[3] The Latin term which appears to correspond most nearly with 'notary' in the modern sense is *tabellio*. For an account of the many changes in the nature of the office of notary, see Savigny, Geschichte des Römischen Rechts, chap. 2. sect. 16; chap. 6. sect. 140.

Italy to a notary to draw up the documents relating to any business in hand, is no doubt partly based on the rigid adherence to forms which has prevailed in countries of which the legal systems are based upon the Roman law. It is also partly based upon the immense convenience which results to the parties from the credit which attaches to a notarial transaction; such a transaction being always presumed to be valid and binding, until it has been impeached, and set aside by a separate proceeding instituted for that purpose. But still it would be wholly incorrect to consider the notary as the mere private agent of the parties, or merely as a person of superior fidelity. Under the French law the notary is clearly a public officer, and his intervention is looked upon as the intervention of the public authority, which through its officer ratifies the transaction. This is not quite so clear in Germany, but here also the notary is considered as a servant of the state.

Notarial transactions are public acts.

481. All documents executed in the presence of a notary having any reference to the creation or transfer of an interest in land are transcribed by him in a public register, which register in France and Germany is most carefully kept and is rendered as far as possible available for general information.

Transcription.

482. There is not either in France or Germany an absolute rule requiring that all transactions relating to land shall be completed in the presence of a notary, but, generally, all gifts and pledges of land must be so. And all documents relating to land which have been privately executed must be registered[1].

Private acts must be registered.

[1] The following references may be useful, if more information is desired upon this subject than is given in the above slight sketch. The transcription of pledges at the Bureau des Hypothéques is provided for in France by the Code Civil, art. 2146; the transcription of gifts *inter vivos* by art. 939. The registration of all documents

Registration in England a failure.

483. In England there are two districts in which every deed relating to land must be registered, Middlesex and York: it is, however, a useless ceremony, because courts of equity in England will not allow the act of registration to have the only effectual operation it can have, namely, that of giving a clear priority to the purchaser who first completes his title by registering it. In Ireland, as the purchaser first registered has an absolute priority, the practice of registration is considered useful.

Not in Ireland.

English law of transfer of land.

484. The actual state of the English law with reference to the transfer of landed property is very peculiar, and not very easy to explain. Delivery is not requisite; there is also now no remnant of any intervention of the state through judicial or other authority in any transaction relating to the transfer of ownership; there is no doubt whatever that the ownership passes at once upon the declaration of intention being made in the proper form; and it is not even necessary that any record of the intentions of the parties should be registered in a public office. The only formality which the English law requires upon the transfer of ownership is, that the intention to transfer should be declared in a formal document: and, in truth, even this requirement is based upon a different principle from that now under consideration, as I shall shew hereafter [1].

relating to land executed privately (*sous signature privée*) is required by the Loi du 22 frim. an xi. The general regulation as to the office and duty of notary is contained in the Loi du 25 vent. an xi. Compare the Italian Civil Code, art. 1315 sqq. Dell' atto publico; and art. 1932 sqq. Della trascrizione. The rules relating to registration in Prussia and Hanover (Grund-buch und Hypotheken-wesen) will be found in Rönne, Staatsrecht der Preussischen Monarchie, sect. 362; and the rules relating to the office and duty of notary in sect. 364, of the same work. See also Allgemeines Landrecht, Part i. sect. 10.

[1] Infra, sect. 489.

485. But (as not unfrequently happens with us) those precautions which we do not find to be rendered imperative by the law, are supplied by the habits of the people. In this, as in many other cases, Englishmen prefer to do for themselves what is elsewhere done by the state. Whilst we have no record of the history of transactions relating to the ownership of land in the public archives, that record is generally found to exist in certain documents which every owner of land possesses. It is the almost universal custom to narrate in private documents, at great length, and with very frequent repetition, the history of every transaction relating to landed property; and many other events which affect the ownership besides actual transfers are there stated, such as mortgages, trusts, marriages, deaths, and so forth. All the documents containing this narrative are carefully preserved, and form what are called the 'title deeds' of the property, and unless this narrative is tolerably complete, and can be either handed over to the purchaser or rendered otherwise accessible to him, it is scarcely possible to take land into the market at all. And the protection afforded by this practice is in some respects analogous to that which is afforded in other countries by registration. Claimants who do not appear upon this private record are not absolutely excluded. Nevertheless, if after the most thorough and careful examination of this record by persons of great skill and experience, there be still any claim to or upon the property which has not been discovered by the purchaser, he will, at least if he has actually got into possession, most probably be protected against it. But if he has, or might have had by due diligence what is called *notice* of the claim, he must give up the property or buy off the claimant.

Title deeds.

Their use as a protection to purchasers.

486. I do not profess that this is at all a complete statement of the law of England on this subject, which is

Difficult to state our law of transfer.

of extraordinary complication; partly on account of the very large license allowed to owners of property in loading it with trusts, and in making posthumous and substitutional dispositions of it; partly because our law has not been made on any plan, and has been allowed, to some extent at least, to grow out of selfishness and caprice; but chiefly on account of the peculiar conflict which exists between courts of law and equity: one set of courts recognising one person as owner, the other set of courts recognising another person as owner, of the same property at the same time, and under the same circumstances; and each set of courts persistently keeping out of view that which the other recognises: for which reason no proposition about the transfer of ownership can be stated very accurately, and at the same time affirmed to be generally true. But what I have said may serve to give the student some notion of the point of view from which the matter is dealt with by English lawyers.

Notice.

487. We are thus introduced to the doctrine of notice which plays so important a part in the transfer of ownership. This doctrine, which is brought into existence in the way pointed out in the last paragraph but one, is founded, no doubt, on a perfectly correct and just principle. For some purposes and to some extent the apparent owner of property must be treated as the real owner, and whilst our law allows almost unlimited freedom in the creation of rights over things, and has almost wholly abolished or declined to adopt the rules which require that the creation of such rights should be completed by some public and notorious act, it still protects those who have purchased in good faith from persons who are reputed to be, and have all the appearance of being, owners. But, on the other hand, persons who know of the existence of claims to or over the property which they seek

to acquire have not the same right to this protection. From this point of view the doctrine of notice is unimpeachable. The objection to the doctrine of notice is that it combines technicality with cumbrousness and extreme indefiniteness. If we consider notice as merely signifying knowledge, we have even then a question of fact which it is sufficiently difficult to determine. But notice has by no means this simple signification. It means something more than this, but what more no man can tell. It is described sometimes as constructive notice; sometimes as implied notice; sometimes as notice in law. An experienced conveyancer could, indeed, in most cases, make a very fair guess whether the Courts of Chancery would treat a thing as notice or not. But for a private person to attempt to form an opinion upon this point would be highly dangerous, and the attempt to instruct people as to what notice is by giving a description of it has been given up as hopeless[1]. The consequence is that all transactions relating to landed property in England have to be conducted by several sets of very highly qualified, and, therefore, of course, also very highly paid experts; and the most difficult and intricate enquiries have to be made on every occasion that any such transaction takes place. The enormous expense and cumbrousness of such transactions no doubt operate very extensively as a check upon the alienation of landed property: and this result has made this inconvenience less unpopular with landowners than it would otherwise assuredly have been.

Cannot be accurately defined.

Great expense of investigating title.

488. As regards moveable property the simple process of registration has found more favour, and our law requires that the transfer of rights to and over moveable property should be registered, when the possession is not transferred[2].

Registration of sales of moveables.

[1] Sugden, Vendors and Purchasers, p. 781, fourteenth ed.

[2] 17 and 18 Vict. c. 36.

Rules as to proof of transfers when writing necessary.

489. There is also a set of rules which affect the mode of transferring property and rights over property based upon a principle distinct from that of securing publicity, but which also work to that end; they are rules intended to prevent litigation by securing facility of proof. Almost every transfer of property is a complicated transaction. The exact extent of the ownership or other right transferred has very often to be scrupulously defined; and the transaction is generally not a mere transfer of a simple right *in rem;* it is accompanied by covenants, agreements, and conditions between the parties, thus giving rise to a variety of rights *in rem*, and also to a number of rights *in personam.* Unless, therefore, the sale be of articles of immediate consumption, the possession of which is at once transferred, and the price paid, the terms of the contract may come into question some considerable time after it has been concluded. Having regard, therefore, to the fallibility of oral testimony as to past transactions, the parties to the transfer are in many cases required to put their intentions into writing, so as to avoid the endless disputes, and even fraud and perjury, which would inevitably arise if important transactions were entrusted to the memory of witnesses. Thus the Statute of Frauds in England as a general rule requires a writing in all transactions relating to land, or to goods valued at over ten pounds. In Prussia it is required in all contracts of the value of seven pounds ten shillings [1]; in France in all contracts of the value of six pounds [2].

Other solemnities besides writing.

490. Sometimes other solemnities besides a writing are necessary in order to render a transaction effectual, which have also been introduced in order to secure facility of

[1] Fifty thalers; Allgemeines Landrecht, Part i. tit. v. sect. 131.

[2] One hundred and fifty francs; Code Civil, art. 1341.

proof. The French law, for example, contains some very minute and irksome provisions as to the form of signing and drawing up contracts[1]. Before the art of writing was as well known as it is now, instead of a writing some other formalities were in use in order to make the intention clear, and to impress the transaction on the memory of the parties[2]; such as shaking of hands, nodding the head, the repetition of certain formulae, giving of earnest money, and so forth. Some of these forms still linger in the habits of the people.

Distinction between rules of proof and other rules.

491. There is an important distinction between the two classes of ceremonies which I have above referred to. For whereas omission of ceremonies of the first-mentioned class, such as delivery or registration, usually only invalidates the transaction as regards third parties—that is to say, it affects only the transfer of the property or right *in rem*, but not the creation of the obligation or right *in personam*—the omission of those of the last-mentioned class invalidates it altogether. This is a consequence of the political origin of the two sets of rules. Facility of proof is as much required between the actual parties to the transaction as where third parties are concerned: whereas publicity only concerns third parties, and the rules which ensure it therefore only come into play when third parties come forward. It is for this reason that the two sets of ceremonies must be kept apart. In point of fact, however, all the rules as to solemnities do co-operate in enforcing both the objects mentioned above; all of them tend to make the transaction public; all of them assist in facilitating proof.

Indian law confounds them.

492. The Indian law upon the formalities requisite for the transfer of ownership is peculiar in not observing

[1] Loi du 25 vent. an xi. sect. 2.

[2] Bluhme, Encyclopädie, sect. 80.

this distinction. There is not supposed to be any general rule of Hindoo or Mahommedan law requiring delivery as a condition to the transfer or creation of a specific right over things moveable or immoveable: the cases in which delivery is required being few and exceptional. Nor is there any rule of evidence analogous to the Statute of Frauds and other similar provisions requiring that all transfers should be accompanied by a record in writing of the transaction. But there is still a very stringent law of registration as to all transactions relating to immoveable property. If the subject-matter of the transaction exceeds ten pounds (one hundred rupees) in value, the document, if the transaction is recorded in writing, must be registered. If not registered, it is absolutely incapable of being used in evidence to establish the transaction; and the transaction is, therefore, not only void as against third parties, but is not even enforceable against the parties thereto. If however the parties have not recorded the transaction in writing, and possession has been given, the transaction stands good. In thus making registration not a formality of transfer, but a rule of evidence, that is, in attempting to secure by it not simply publicity and protection to third parties, but facility of proof, the Indian law stands, I believe, alone, and a door is opened to fraud, of which advantage is not unfrequently taken.

Another peculiarity of Indian law of registration.

493. There is also another respect in which the law of India is peculiar. In cases of gift, pledge, or sale of immoveable property of less value than one hundred rupees, the transaction need not be recorded in writing, and, if so recorded, need not be registered; but it may be so if the parties choose; and then it gives a better title than any previous unregistered document. Preference is also given to a registered document over oral transactions. But, whilst there is a saving in favour of oral transactions

followed by possession, there is no such saving in favour of transactions in writing. Hence, where possession follows, an oral transfer of immoveable property seems to be placed by the Indian law in some respects even above a written one [1].

[1] Art. viii. of 1871.

CHAPTER XIV.

SECURITY.

Insecurity of obligations.

494. ONE of the most ordinary transactions of daily life is the making of contracts; and, apart from their contracts, people are daily falling under legal obligations of various kinds. For many reasons the performance of these obligations is more or less insecure; sometimes the debtor is obstinate; sometimes he is careless; sometimes he is positively unable to do what he ought.

Debtor and creditor.

495. I have spoken here of the debtor. That word is generally used by English lawyers to signify a person who owes money to another; I shall use it to signify any person who owes a service to another which is capable of being represented in money[1]; and I shall use the word creditor to express any person to whom such a service is due.

[1] The expression by which Professor Kuntze in the portion of his work of which I have made such extensive use below, indicates the kind of demand for which security may be given is 'die kunftige Leistung eines Vermögenswerthes.' I am not sure that I have used an expression exactly equivalent to this: but it is clear that only demands which could be satisfied by a money payment, or at any rate only demands so far as they could be satisfied by a money payment, could have been in the learned author's contemplation, because he speaks of a real security as being, in all cases, ultimately attained. Security may be given for any demand, but a real security will only produce money or a money value. (See infra, sect. 501.)

496. I shall also use the word security to express any transaction between the debtor and creditor by which the performance of such a service is secured. Unless this liberty of choosing my own expressions be conceded to me, I could not attain even a reasonable degree of conciseness and precision in the discussion of this subject. Meaning of term security.

497. It has been often said that the English law of security is derived from the Roman; and it is certainly true that whenever questions of difficulty have arisen upon this subject, English lawyers have almost invariably looked to the Roman law for assistance. English law of security derived from Roman.

498. Unfortunately, instead of applying to the best sources of information, the Digest or the Code itself, or even availing themselves of the labours of the best modern commentators, English lawyers have placed themselves completely under the dominion of Story. I am not sufficiently acquainted with Story's writings to venture to appreciate exactly the value of his authority on general subjects. In questions of Roman law he appears to rely chiefly upon Domat and Pothier: which would be like relying in chemistry on Lavoisier and Priestley. The labours of these great men have been long ago eclipsed by later discoveries. As to the Roman law of pledge, at any rate, Story's knowledge was, I feel sure, both faulty and incomplete, otherwise he could not have been misled into making such statements, as that *pignus* was *generally* applied to mere personal property; and that nothing but what was capable of delivery to the pledgee was deemed to be the proper subject-matter of pledge [1]. Not from the best sources.

499. It is perfectly clear that if we are to rely upon the Roman law for assistance at all, we must not only avoid Advantages of a comprehensive

[1] Story on Bailments, sects. 286, 290 a. He was evidently puzzled, like Pothier, by what appeared to be irreconcileable statements in the Roman law.

knowledge of the Roman law.

such mistakes as these, but must thoroughly comprehend its principles in their latest and fullest development. I have, therefore, given here a short general statement of the Roman law of security borrowed from the work of a learned living author[1]; and I believe it will serve to give the student a good general grasp of the principles upon which this portion of the law must always be administered, whatever diversity there may be in particular rules. I also think that it is well worthy of study, not only as illustrating and explaining our own law, but as a striking combination of plain good sense with scientific accuracy of expression. I know nothing in jurisprudence more sound, more forcible, or more acute.

Earliest form of security.

500. From the earliest times the Roman creditor never seems to have thought of relying solely on the good faith or ability of his debtor for the satisfaction of his demand. By the *nexum*, the oldest form of contract, the debtor was handed over bodily to the creditor, becoming, in fact, his slave; and it was no easy matter for the debtor to escape from his obligation. Upon entering into the *nexum* he had to procure six fellow-citizens as witnesses to, and assistants in the formalities of, the transaction. This gave strength and precision to the obligation. But the presence of these witnesses was in later times further utilised in a way which ultimately led to a great advance in the law. By means of the other ancient form of contract, the *sponsio*, it was easy to secure the concurrent engagement of these six persons, in addition to the principal debtor, that the obligation should be performed; so that, in case of the failure of the latter, the creditor might have recourse to them.

[1] Cursus des Römischen Rechts, Lehrbuch für den Academischen Gebrauch, von Dr. Johannes Emil Kuntze. Leipzig, 1869.

501. It will be observed that the creditor was thus to some extent secured not only against the unwillingness but against the inability of his debtor. Still the prevailing idea was that of pressure brought to bear upon the will of the contracting party; of some inconvenience to be suffered if the engagement were not fulfilled; and this was quite consonant to the spirit of the old Roman law. But it did not long suffice for all the wants of a busy practical people. What was wanted by creditors was a tangible means of obtaining satisfaction for their claims wholly independent of the will of the debtor. This was actually obtained, though only after a very long struggle. The creditor at length got what is called *real* security; that is to say, he got, not only the promise of the debtor and a means of compelling him to fulfil that promise, but he also got a right over a specific thing which ensured to him the performance of the promise, quite independently of the wishes or ability of the debtor; so that at last not only the will of the debtor, but even the debtor himself was so little regarded that, in the latest period, it almost seemed as if the thing which was made security was treated as the debtor, and not the original party to the obligation. The progress of the Roman law from a simple pressure upon the will of the debtor to this, its ultimate development, is in the highest degree interesting.

Entirely personal.

Creditors want real security.

502. The first advance upon the *nexum* and *sponsio* was the transaction called *fiducia*. This was a formal proceeding, suitable to any case in which it was desired to transfer to another a specific thing under conditions. It therefore was not confined to the taking of security, but was also used in cases of deposit or loan. Ultimately, however, it came specially to signify the taking of security.

Fiducia.

A complete transfer of the property.

503. In the transaction of *fiducia* the various conditions upon which the thing was to be returned were defined by the contract under which it was transferred. If it was a case in which security was to be given, the creditor got the debtor to make over to him the full ownership of the thing, binding himself to return it as soon as the obligation was fulfilled. This was an easy and effectual way of obtaining security, and it remained in use even after the introduction of the other modes which will be hereafter described; indeed, it was well known to the western world, at least in Italy, up to the time of the Christian Emperors. It was, in fact, a proceeding similar to an English mortgage, but without a power of sale or foreclosure.

This not always convenient.

504. There were, however, many things which were in every way suitable to be used as security for the performance of an obligation, but to which, on account of certain well-known difficulties, the proceeding by way of *fiducia* was inapplicable [1]. I need not enter at length into the nature of these difficulties; they were no doubt technical, but were too deeply rooted to be swept away for a special purpose without destroying the symmetry (*elegantia*) of the law, and thus causing confusion. The Roman lawyers, therefore, introduced another proceeding called *pignus*, the effect of which was to get rid of the transfer of ownership altogether, and to substitute for it a transfer to the creditor of the bare possession, of course under the same condition as to its return, when the debt was satisfied.

Pignus.

Defects of both *fiducia* and *pignus*.

505. In both these processes, however, there were inherent defects. In the case of *fiducia* the debtor was

[1] Either a *mancipatio* or an *in jure cessio* seems to have been necessary to bring back the property, and I should suppose also to convey it, in the first instance, to the creditor. See Smith's Dict. Antiqq. s. v. *Fiducia*.

dependent on the good faith of the creditor for the restoration of his property, for if the creditor had parted with it, he had only a personal remedy against him; on the other hand, the creditor could not consistently with his contract obtain any material satisfaction out of the thing transferred to him, which was, perhaps, not even in his possession. So, in the case of *pignus*, the creditor was exposed to the risk of the property being sold by the debtor to a third person in fraud of his security; in which case, if the thing pledged were land, the creditor was wholly unprotected against this third person's claim[1]. Indeed this defect was so serious that, until it was removed, land was very rarely given in *pignus*. The *pignus* too, like *fiducia*, produced no material satisfaction of the claim, but only a pressure upon the will of the debtor, arising from the inconvenience of being kept out of his property. So far, therefore, the law was still under the dominion of the idea that it was the will of the debtor which was to be acted upon.

Security required by landowners from their cultivators.

506. The most important improvements in the Roman law of security were not introduced until, by the extension of the Roman dominion beyond the confines of Italy, very large estates first became common. From this time large numbers of slaves and even of free persons[2] began to be *Latifundia.*

[1] It was this inapplicability of *pignus* in its original form to land, combined with the false etymology of the term (*a pugno*), which led to the saying that *pignus* properly (*proprie*) could only be given of moveable property. This has misled Story (Bailments, sect. 286), who translates *proprie* 'generally,' and seems to think that the distinction between *pignus* and *hypotheca* was a fundamental one, though occasionally lost sight of: the truth being that it was one of little importance and very rarely noticed. In later times a *pignus* in which the possession was not transferred, and a *pignus* of land, were every-day transactions.

[2] This is Prof. Kuntze's statement. Sir Henry Maine is of opinion that there were no free cultivators (Ancient Law, first ed.,

employed in cultivating these properties. Small estates also were sometimes let out to farm. Hence the necessity that the landlord should have some security for his rent became apparent at Rome, as it has in all places where the land of one person is cultivated by another.

They could not obtain it under the old law.

507. Under the old law it was not easy for the landlord to obtain this security from the cultivator. Generally the only property which the cultivator had was his farming stock (*invecta et illata*); and it was obvious that this could neither be assigned to the landlord by a *fiducia*, nor given into his custody by a *pignus*. It was therefore necessary to devise some other means of effecting security; and the mode adopted was, to allow the tenant by a simple agreement, without any formalities, to pledge his farming stock to his landlord as a security for the rent. The validity of such an agreement was first recognised by a praetor of the name of Salvius, who thus led the way to the most important changes in the law of security. The property of the tenant could be followed, if it had been removed by him off the farm in fraud of his agreement with his landlord. At first, however, this could only be done within very short periods of time after the removal. If the property were still in the hands of the tenant, the landlord could have it brought back within the year. If it had passed into the hands of a third person, then it could not be pursued, if the latter had held it either for a year, or, at least, for as long a time as it had been upon the land of the tenant. This strict rule of limitation, however, was considered to make the security too perilous, and another praetor, named Servius, removed this limitation, and gave to the landlord the ordinary right to sue for and recover the thing alienated.

Origin of *hypotheca*.

p. 299). But see Plin. Ep. iii. 19; and for an account of the *colonus* see Kuntze, Excursus, p. 299.

508. The Roman law of pledge always retained something of the agricultural character thus impressed upon it; for these provisions did not long remain confined to the claims of landowners. The Servian action (as it was called) was extended to all kinds of property, and all kinds of claims; and thus an entirely new kind of right over a thing, or real right, was created, and that too by means of a simple agreement without any formality. This right in the view of Roman lawyers was a servitude, and it was analogous in some respects to a right of usufruct.

It was a right *in rem* in the nature of a servitude

created by contract.

509. This form of security was called by the Greek name *hypotheca*, and it was probably of Greek origin, being copied by the Romans from the Greeks of southern Italy, where they had become familiar with it. It was only a development of the original *pignus*, although it was at the same time a very considerable advance upon it; and the Roman law did not henceforth keep up any distinction between *pignus* and *hypotheca*. Whether the possession was actually transferred or not, the agreement by one man that his property should be a security to another was in later times called indifferently *hypotheca*, or *pignus*; although, of course, strictly speaking, the term *pignus* was only applicable when the thing pledged was actually handed over, which, as we have said before, was rarely done except in the case of moveables.

Of Greek origin.

Identified subsequently with *pignus*.

510. Still we have not reached the point aimed at. The creditor had a real right, but he had no real security; that is to say, he had no independent means of satisfying his claim if the debtor neglected to do what he ought. This had yet to be provided for, and the mode of doing so was suggested by an ancient rule of the Roman law, that in the case of land pledged to the state (*praedia*), the state could sell the property and satisfy its own debt. It became customary for private creditors to stipulate for a

Did not originally give a real security.

Power of sale.

similar right; and this right of sale, coupled with the rights conferred by the *pignus*, or *hypotheca*, gave to the creditor the means of satisfying his claim, and rendered him entirely independent of the debtor. It was necessary at first for the creditor to obtain the right of sale by a special concession, but in later times it was always presumed to exist. Indeed, the law went even a step further. A positive agreement by the creditor not to sell had only the effect of rendering three several notices to the debtor necessary, instead of the single one which would otherwise suffice.

Extended to *fiducia*.

511. These were the steps by which the law was developed in the case of *pignus* and *hypotheca*. In the case of *fiducia* the result was the same, though the method of arriving at it was different; there the ownership was already transferred to the creditor; and the most obvious course in the case of the debtor's failure was by express agreement to make the creditor's ownership absolute. Indeed, this could at one time be done. But as soon as the right of the creditor in the case of *pignus* to sell and satisfy the debt was fully established, the right to do this was attributed to the creditor in the case of *fiducia* also; and thenceforth the clause of forfeiture[1] or foreclosure fell into disuse, a sale by the creditor being in every respect more in accordance with the spirit of the law as administered under the Christian Emperors than a foreclosure.

Importance of power of sale.

512. Henceforth the right to sell and satisfy the debt (*distractio*) came to be considered as the very essence of the law of security. The person in whose favour the security was given always had this right; and therefore,

[1] This clause in the agreement was called *lex commissoria*. It was declared by Constantine to be illegal; Smith's Dict. Antiqq. s. v. *Pignus*. But the creditor might still agree to purchase at a fair price. See Windscheid, Lehrbuch des Pandekten-Rechts, sect. 238.

as a pledge might in all cases result in a sale, nothing could be pledged which could not be sold. Subject to this, however, everything which we should call property might be given as a security; any beneficial right to the use or enjoyment of land, and even easements might be so dealt with; the only test appearing to be whether it was possible for the creditor to extract from the thing pledged satisfaction of his demand. Debts due to the debtor could be given as a security; the creditor being able to obtain satisfaction by causing payment to be made to himself, or by selling the debt to a third person.

Pledgee could pledge over.

513. So too a creditor could give the thing pledged as a security for a debt of his own; but subject, of course, to the rights of the original pledgee. If therefore the original debt was paid off, the second pledgee lost his security; but he could prevent this by giving to the original creditor a proper notice.

514. I pass over the rules which relate to the constitution of several pledges for one demand, and successive pledges of the same thing for several demands, discussing further on the question of priority of claims, and I proceed now to state more particularly the nature of a security under the Roman law, and the position of the debtor and creditor after it has been given.

Obligations of any kind may be secured.

515. The particular nature of the obligation of which the performance was to be secured was immaterial, and a security might be given for the whole of a debt or for a part. It was also of no consequence whether the debtor himself gave the security, or some one else for him[1]. A pledge might even be given for a claim which could not be

[1] There was, of course, the limitation above referred to (sect. 495 note) that the security could only produce money to the creditor in satisfaction of his claim.

enforced by law, such as a mere debt of honour, or a moral duty. A security also, like an obligation, could be conditional or future.

Ownership not altered by pledge.

516. Giving a thing in pledge did not prevent the owner dealing with it as he thought proper, provided that he did not interfere with, or lessen the security of his creditor. Any dealings which would have that effect were null and void as against the purchaser from the creditor, should the latter exercise his right of sale. But in the case of moveable property the pledgor was not allowed to alienate it without the consent of the pledgee; the alienation was not absolutely void, but the pledgor was personally liable as for a misappropriation, and of course such a sale did not displace the creditor's security.

Use and profits belong to pledgor.

517. The use and profits of a thing given as security belonged entirely to the pledgor, unless it were expressly agreed to the contrary. If the pledgee were in possession, then he was bound to make as good a profit as he could out of everything from which his debtor had made a profit, being responsible for not doing so. It was only where there was a loan of money, and no agreement at all about interest, that the creditor in possession of a security could take the profits himself, and then he could do so only to the extent of a moderate rate of interest; of course he could not take them if interest had been expressly excluded. Sometimes the parties expressly agreed that the whole profits should be taken in lieu of interest, and this was allowed.

Tacking.

518. The Roman law recognised to some extent the principle of tacking. If the creditor had any other claims for money in writing against the debtor, he could retain possession of the security, notwithstanding that the debt for which it had been originally given was satisfied, whether these other claims were created before or after

the security was given. But, as far as I am aware, the unjust rule of English law, that the first creditor has a priority over a subsequent pledgee even in respect of unsecured debts, was never adopted.

Power of sale how exercised.

519. Of course the right to sell the thing pledged and satisfy the debt was the most important of all the rights of a secured creditor. This right could not be exercised until the debt was actually due, and notice had been given to pay it. The sale was conducted by the creditor, who was looked upon as an agent of the debtor. Not that agency is, strictly speaking, the legal ground of the transaction; the creditor, when selling, acted in his own right; but the creditor was so far an agent that he had specific duties to perform in order to protect the interests of the debtor when the security was brought to sale. For instance, it was his duty to advertise the sale, and to give notice to the debtor when and where it would take place, so that the latter might know exactly what was being done, and might interfere if necessary. This notice was quite distinct from the notice to pay the debt prior to the exercise of the right of sale. And though the conduct of the sale was left to the creditor, he was bound in all things to consult the interests of the debtor as far as possible. If no suitable purchaser could be found, then the creditor could ask that the thing given as security might be adjudged to belong to himself; but in such a case it could still be redeemed by the debtor at any time within a year. The only other case in which the creditor could obtain the ownership absolutely for himself was where there had been an express stipulation that, if the debt were not paid, the creditor should become the absolute owner (whilst such an arrangement was allowed[1]), or by an agreement to purchase at a fair price.

[1] See supra, sect. 515 note.

Creditor could claim for deficiency.

520. It was the duty of the creditor to get in the money from the purchaser, and after paying himself to hand over the surplus to the debtor. Of course if there was not sufficient to discharge the debt, the balance remained due.

Involuntary pledges.

521. A pledge might be created either voluntarily or involuntarily. A voluntary pledge might be created by contract, or by will; an involuntary pledge might be created either by express order of Court, or be attributed by the law as an incident of certain transactions. Involuntary pledges of the former class correspond to what we call attachments; those of the latter class originated chiefly in contract; afterwards the contract was presumed to exist; and the pledge only became really involuntary when the contract was altogether lost sight of.

Only one kind of security.

522. I do not propose to state at length the particular modes in which a security was created by contract, by will, by operation of law, or by the order of Court. I would only note that the Roman law had this great practical convenience, that there were general rules applicable to all kinds of security alike by whatsoever means created. There was no difficulty about this, the general object and character of the transaction being the same throughout; and it conduced greatly to brevity, clearness, and precision of the law that this should be so.

General pledges.

523. A security was not necessarily restricted to a single thing, but there might be a pledge of several things, and even a general pledge of all a man's property. But here an important distinction must be borne in mind. A general pledge of all a man's property is not a pledge of his property viewed as a whole (*universitas*); for then the debts due by him would be included; but it is a pledge of each several thing now belonging or hereafter to belong to the debtor.

524. The following are the principal methods by which a security came to an end: (1) when the pledgee became the absolute owner of the property given in pledge; (2) when it was agreed that the property should be released; (3) when a third person had held the property honestly as his own for twenty years; (4) when the obligation, the performance of which was to be secured, was discharged; (5) when the pledgee exercised his right of sale. Extension of pledges.

525. There was, however, an exception to the rule that the security was extinguished when the pledge was sold, or when the pledgee acquired the ownership himself. This is a part of the Roman law upon which modern commentators are not fully agreed[1]. The opinion seems to be, that the same person could not set up his right both as purchaser out and out and as holder of a security; but if, as purchaser out and out, he was in a less favourable position than as a security holder, then he could elect to treat the transfer to himself as a transfer of the security only. Not always extinguished by sale.

526. How to settle the claims of several creditors, each holding security upon the same property and each claiming to exercise his rights, has always been a problem of some difficulty. The Roman lawyers acted almost exclusively upon the principle that the creditor earliest in point of time had the prior right, and they justified this by their view of the nature of the right of the pledgee, namely, that it was a right *in rem*, or real right—a right like ownership available against all the world, which no subsequent dealing to which the pledgee was not a party could invalidate or impair. No regard was paid to the mode in which the pledge had been acquired, nor did it make any difference that another creditor had obtained possession; as a rule the date alone was looked to. Priority.

[1] See Vangerow, Lehrbuch der Pandekten, sect. 392.

Exception to rule of priority by date.

527. There were, however, exceptions to this rule. Thus when a sum of money was expressly advanced on account of the purchase money at a sale of an estate, the lender could obtain a security upon the estate prior to other claimants[1]. So when money had been advanced for the express purpose of preserving a thing from destruction, the lender could obtain a similar priority; as, for instance, in the case of a bond for money advanced to equip or repair a ship on a bottomary bond as we should call it. The claims of the state for public dues had also a preference over those of private persons.

Rights of subsequent pledgees.

528. The rights of a subsequent pledgee were the same as those of any other secured creditor, subject only to the rights of the pledgees who preceded him. He could bring the property to sale, and could even compel a prior pledgee to do so. He had also the special right to pay off any prior creditor and take his place; and if the prior creditor refused to take the money, he might deposit it in Court. If the first pledgee sold and the property was more than sufficient to pay his debt, the next pledgee could claim to be paid out of the surplus.

English law of security.

529. Having thus stated shortly the Roman law of security, I proceed to consider the English law: and, first, as it is administered in the Courts of Common Law.

Distinction between pledge and lien.

530. The law is here certainly in a backward condition. It knows no method of giving security over immoveable property, and as to moveable property it appears to me to be somewhere about in the same state of development as the Roman law at the time of the first Punic war. The common lawyers insist very strongly

[1] This priority, founded on what was called an *in rem versio*, did not affect a creditor whose rights had been created by a prior owner. It only affected the priorities among creditors of the same owner. Windscheid, Lehrbuch des Pandekten-Rechts, sect. 246.

that possession is necessary to create the security, and upon the difference between a pledge and a lien. They consider a lien as a mere personal right of detention which gives the creditor no means of satisfying his debt, but only produces a pressure upon the will of the creditor, arising from the inconvenience of being kept out of his property; whereas (they say) a pledge is something more. The cases are not very explicit as to the distinction, but I gather that a pledge is constituted by adding to a lien the permission to the creditor in case of default to sell and satisfy the debt. It is not however altogether clear when this right of sale exists and when it does not.

Unauthorised sale.

531. It is easy to understand that creditors, dissatisfied with a dry right of detention which is very often burdensome, frequently attempt to sell the property pledged; and no subject has vexed English judges more than the question, what remedy a debtor has for a wrongful, a premature, or an unauthorised sale by a creditor of the property which he holds as security. The knot has been partly cut by the Factors' Acts: but it is a question which still frequently arises where these acts do not apply. It is now pretty well settled that the debtor can only recover such actual damage as he may have suffered; and no one can complain of the injustice of the result thus arrived at. But I confess I do not understand a good deal of the reasoning on which this opinion is based, and I think some advantage may be gained by examining it. It is in these cases particularly that so much learning and ingenuity have been expended in establishing that the creditor got not only a lien but a pledge, that is, not a right of detention only of the article pledged, but also a right to sell and apply the proceeds in satisfaction of the debt under the conditions of the contract; which right, they say, gives the creditor a 'specific interest or property' in the article, or,

Pledgee has a real right.

what Mr. Justice Blackburn calls, in common with most jurists, a real right[1].

This does not depend on power of sale.

532. Now it is no doubt perfectly true that the pledgee has a 'specific interest or property' in the nature of a real right; but what one is at a loss to see is, in what way that depends upon his having also a power of sale. Still less is it easy to perceive how the nature of the creditor's interest can determine the question, to what remedy the debtor is entitled in case of an unauthorised or wrongful sale. This, as the learned judges elsewhere point out in the cases to which I refer, depends upon the contract between the parties, and the effect which is produced by a violation of its terms by one of them[2].

True nature of the real right.

533. I cannot therefore exactly see, why this discussion about the pledgee having a real right is introduced. I am disposed however to think that there has been some misunderstanding as to the true nature of a real right, which the judges are so desirous to attribute to a pledgee[3]. A real right is a right over a specific thing available generally against all persons, as distinguished from a personal right in respect of the same thing which is available against an individual or individuals only; a *jus in rem*[4] as dis-

[1] Law Reports, Queen's Bench, vol. i. p. 612. Mr. Justice Shee calls it a *jus in re* (p. 595). But he means the same thing; see Austin, Lectures, pp. 990, 992, third ed. I may here observe that, if what Mr. Justice Shee states at p. 603 as to Domat's views be correct, it is astonishing to what an extent Domat has misunderstood the Roman law.

[2] Law Reports, Queen's Bench, vol. i. pp. 600, 615, 619; id. Exchequer, vol. iii. p. 301.

[3] I may observe that in the case in the Queen's Bench, Mr. Justice Shee, whilst he agrees with Mr. Justice Blackburn, that the pledgee has a real right, comes to a directly opposite decision upon the case before him.

[4] Or *jus in re*, as Mr. Justice Shee call it: but *jura in re* are only a subdivision of *jura in rem*. See Austin, pp. 990, 992.

tinguished from a *jus in personam.* Ownership, for example, is a real right, and it is in fact the sum of all real rights, as explained above [1]. The particular kind of real right which the courts were dealing with in the above cases was not the right of an owner, but the right of one person over a thing owned by another; the right of the creditor to sell the debtor's property; a right in kind just like an easement. But whether the pledgee has or has not such a right is wholly unconnected with the right to sell.

534. Possibly what the learned judges were thinking of was, in truth, not a real *right* but a real *security.* What constitutes a real security has already been explained [2]: it is the means of getting satisfaction out of a specific thing independently of the will or ability of the debtor. This comprehends a real right, but also a great deal more; and it is perfectly true to say that the essence of a real security is the power of sale. But then it must be borne in mind that the possession by the creditor of a power of sale, and his ability to exercise it, in no way affects or is affected by the nature of his interest in the article pledged. This power of sale when exercised operates, not upon the interest of the creditor, but upon that of the debtor, according to a principle perfectly familiar to any English lawyer. Difference between real right and real security.

535. The law of security has been far more satisfactorily dealt with by the Courts of Chancery, at least in reference to lands. This portion of the law of England bears a considerable resemblance both in its history and its ultimate condition to the Roman law, and seems to be, like the latter, the combined result of clear legal ideas with practical business habits. Pledge of lands in Courts of Chancery.

536. The class of securities with which the Courts of Chancery are specially concerned are called mortgages. Mortgage.

[1] Supra, sect. 293 a.

[2] Supra, sect. 501.

I need not here explain at length the nature of a mortgage, as it stood before the Courts of Chancery undertook to modify the rights of the parties, and as it stands now in a court of common law. It is an absolute conveyance, with a condition that, if the money be paid by a certain day, the property is to be restored to the owner. If that day is allowed to pass, the ownership of the mortgagor becomes absolute[1].

Present law of mortgage.

537. I wish for the moment to divert attention from the history and course of development of the English law of mortgage, and also to get rid of the terms which the Court of Chancery frequently finds itself compelled to employ, because it is cramped by the form of the instrument and the peculiar basis of its jurisdiction. Stated in ordinary language, the law is now as follows:—The transaction of mortgage creates a debt by deed under seal secured by the pledge of lands[2]. The debtor remains the owner of the property, and may deal with it in any way he thinks proper, provided he does not lessen or impair the security of the creditor. The creditor, whether in or out of possession of the land pledged, has the right to his security and nothing more. If the creditor take possession he is accountable to the debtor for his management of the property, and for his receipts. The creditor who has a mortgage has a real security; that is, he may, in case the debtor fails to do so, satisfy his own debt by selling the land pledged. The power to sell and satisfy the debt is frequently given by express contract, but even if not given by contract it is given by law[3]. The concurrence of the debtor in the sale is immaterial; but six months'

Mortgagee can always sell.

[1] It is somewhat similar to the original *fiducia:* supra, sect. 503.

[2] Coote on Mortgages, third ed., p. 1.

[3] 23 and 24 Vict. chap. 145. sect. 11; Dart, Vend. and Purch., fourth ed., p. 48.

notice must be given before the power is exercised. The creditor, unless restricted by the contract, may sell privately or by public auction; in one lot or in parcels; but not in undivided shares. And though the conduct of the sale is left entirely to the creditor, he must not adopt any mode of selling which would be clearly depreciatory. He is in fact a fiduciary vendor, and must use all reasonable diligence to obtain a fair price. But his power to sell, if unrestricted by contract, cannot be interfered with, even though his conduct be harsh and oppressive: the only course to stay the sale is actually to tender the principal, interest, and costs[1].

538. Why these clear and sensible rules should be confined to the Court of Chancery one is at a loss to conceive; and why Courts of Common Law should have been shut out, or should have shut themselves out, from all jurisdiction over landed security it is also difficult to say. Here there is surely an opening for getting rid of our double system of law and equity with some prospect of success. Under the new constitution of the Courts this ought to be a matter of no difficulty.

Chancery law of mortgage might be extended.

539. There has been one attempt at a complete revolution of the ideas of a mortgage security prevailing in the English Courts of Common Law, made by a judge who was fearless of innovation, and to whose hands innovation might have been safely trusted. The question arose in this way. A person having a leasehold interest in land assigned it to another by way of security, in the usual form of a mortgage of land. Of course, in strict law, this was an absolute assignment, and the assignee became liable to the lessor upon the covenants in the lease. In an action, however, by the lessor against the assignee of the lease, upon a covenant contained in the lease, judgment was

Lord Mansfield attempted to extend it.

[1] Dart, Vendors and Purchasers, pp. 60, 63.

unanimously given for the defendant by the Court of Queen's Bench, consisting of Lord Mansfield and Justices Willes, Ashurst, and Buller. Lord Mansfield argued that in order 'to do justice between men it is necessary to understand things as they really are, and to construe instruments according to the intention of the parties.' He therefore refused to treat the mortgage as if it was in reality (what it no doubt was in form) a complete assignment of the lessee's interest, and considered it as a mere security [1]. Had these views been adhered to, there can be little doubt that the position of mortgagor and mortgagee in Courts of Common Law would have been in a great measure, if not entirely, assimilated to their position in the Court of Chancery. It is, perhaps, therefore not surprising that they were firmly opposed by Lord Mansfield's successor, Lord Kenyon [2], who seems to have treated Lord Mansfield's opinion and that of the other judges who concurred with him almost with contempt, and declared that he would over-rule it 'without the least reluctance [3].'

Defeated by Lord Kenyon.

Holder of security on moveables cannot always sell.

540. I can scarcely say why, but even Courts of Chancery have sometimes shewn something of the same timidity as is shewn by Courts of Common Law, when they have had to deal with security over property other than land. If goods be mortgaged even in the same form as land is usually mortgaged, the mortgagee's rights are not so full and complete [4]: and when a security has been established in the nature of a *lien*, Courts of Chancery have not ventured any more than Courts of Common Law

[1] See the case of Eaton against Jaques in Douglas' Reports, p. 455.

[2] Coote on Mortgages, third ed., p. 120. This learned author was also evidently alarmed at what he calls Lord Mansfield's 'equitable innovations.'

[3] Coote on Mortgages, ubi supra.

[4] Dart, Vend. and Purch. p. 48, fourth ed.

to give effect to the security by permitting a sale. In a recent case, where the Court of Chancery was pressed to exercise its jurisdiction by directing a sale, Lord Hatherley (then Vice-Chancellor) expressed his opinion that it would be dangerous to do so [1].

Bare right of detention often useless to creditor.

541. There are still, therefore, many cases in which the creditor has a bare right of detention, and can neither by his own right nor by the assistance of any Court obtain any satisfaction of his claim if his debtor is obstinate, however beneficial to all parties a sale might be. Thus a vendor of goods before delivery may retain, and in some cases even after delivery may retake possession of them, and hold them as a security for the unpaid price; but he cannot sell them; and so this detention may continue till the goods become valueless, when the creditor will have lost his security and the debtor his property [2].

Burn against *Carvalho.*

542. There are however cases in which this narrow conception of the law of security as applied to moveable property appears to be dropped without hesitation, and the widest possible validity is given to arrangements made by debtors for giving to creditors security for their claims. I do not know upon what distinction this change of view proceeds. Of course every variety of right may be created by agreement, but the difference in the agreement in some of these cases is very slight, and I suspect a good deal more depends on the inclination of the Court

[1] See the case of The Thames Iron Works Company against The Patent Derrick Company, Law Journal Reports, Chancery, vol. xxix. p. 714.

[2] If the remarks of such able and experienced lawyers as Mr. Justice Blackburn and Mr. Benjamin upon the rights of the unpaid vendor be considered, it will be apparent that my observations upon the unsatisfactory condition of the English law are neither presumptuous nor unfounded. See Blackburn on Sale, pp. 320 sqq.; Benjamin on Sale of Personal Property, book v. chap. iii.

78778

when determining the intention of the parties, than on the exact words. In the case before Lord Hatherley above referred to [1], the debtor agreed with his creditor, who had already a lien or bare right of detention, that the property should hereafter be mortgaged for the claim with a power of sale. There the creditor was helpless. Yet in another case [2], where there was nothing but a promise by the debtor to 'hand over' to his creditor property of an amount equivalent to this debt, it was held by Lord Cottenham that this promise alone gave the creditor a right to have the property applied to liquidate and satisfy his debt. This is a decision which has been since frequently followed, and the incidents of the transaction, as well as the effect which was so readily given to it, are worthy of remark. In this case nothing was specified; the promise related to 'any property' in the hands of the debtor's correspondent abroad; the nature and value of the property was wholly unknown; the amount of the debt due was also wholly unknown, it being probable that the debt (which was not specified) had been partly paid; the right was considered to be created by the promise to the creditor alone (the Lord Chancellor says so expressly in his judgment [3]) before it had been even communicated to the debtor's correspondent. But what is most important is the result. The mere promise to transfer the goods to the hands of the creditor was considered to create, not merely a right to hold them until the debt was paid, but a right to apply them at once, and without any formality

[1] Supra, sect. 540.

[2] This is the well-known case of Burn against Carvalho, reported in the fourth volume of Mylne and Craig's Reports, p. 690. The same case had previously been before a Court of Common Law, and an opposite view taken. See the report in Adolphus and Ellis, vol. i. p. 883.

[3] See p. 703 of the report.

or delay, in satisfaction of the debt: the creditor, as soon as he got possession, which he did not do until after his debtor had become bankrupt, sold the goods without further notice or ceremony, charging all expenses incurred upon his debtor.

543. I do not at all suggest that this decision was erroneous. Experience has shewn that the principle on which it proceeds is (commercially speaking) convenient, and there is no legal difficulty whatsoever in carrying it out. But there is certainly to my mind a difficulty in seeing so great a difference between the agreement in this case and that in the case before Lord Hatherley, as to lead to such totally different results. Compared with other decisions.

544. From this account of the English law of security it is apparent that no clear, consistent, and comprehensive statement of principles can be made with regard to it. At any rate this has never yet been done. On the other hand, no difficulty is found in preparing such a statement of the law of security either as it existed under the Roman Empire, or as it now exists in countries where the Roman law has been adopted with a real and comprehensive knowledge of what that law was, and the principles upon which it was based[1]. I think therefore that there can be no escape from the conclusion that the faults of the English law are due, not to its connexion with the Roman law, but to the imperfect manner in which the Roman law has been understood. I have therefore, borrowing the result of the

[1] See for instance the Allgemeines Landrecht für die Preussischen Staaten, Part I. tit. 20. sections 1 and 2. This composition is not to be compared for clearness and precision with some portions of the more recent Allgemeine Deutsche Handelsgesetzbuch, yet it is incomparably better than anything to be found in the English language: and although it is in many parts tediously minute, the subject of pledge only occupies forty-six octavo pages; not as much as our annual Mutiny Act.

labours of others, given a pretty full statement of the Roman law, in which I think it will be seen that the principles recognised are not altogether different from the principles of our own law, but they are fewer, simpler, and more consistently followed.

CHAPTER XV.

SUCCESSION.

545. There are few institutions of law which can be fully understood by considering them as they exist at any one time, or in any one place. This is specially true of that head of law which is dealt with in this chapter, and I will therefore attempt to state how our present notions as to succession originated. Origin of law of succession.

546. I will first explain generally what I mean by the term succession. Every member of society has an infinite variety of rights, and is subject to an infinite variety of obligations. He has property in his own possession; he has property in the possession of others; the law has bound him to other persons, and has bound other persons to him; he owes money to some, others owe money to him; he has of his own accord entered into engagements of various kinds with various persons, and bound various persons to himself by contracts; many of these obligations on either side remain unperformed. Thus a man carries about with him (so to speak) a vast mass or bundle of rights and obligations, which are attached to himself, in the sense that they are conceived as binding *him* or belonging to *him*. This mass or bundle of rights and obligations the Roman lawyers called a man's *jus*. What becomes of these rights and obligations when the person dies to which they are attached? Do they also perish? If not, on whom do Meaning of succession.

they devolve? That is determined by the law which I am about to consider—the law of succession.

How far based on fictions.

547. It is frequently said that the law of succession rests entirely upon fictions: and this portion of the law has accordingly had to sustain the attacks upon that weak side which all institutions based upon fictions present. How far the statement that the law of succession is based upon fictions is true will appear, when we examine the conceptions from which it has been derived.

Universitas juris.

548. The first main conception which underlies the modern law of wills cannot be seized without a little preliminary consideration of a term of the Civil Law, which contains the idea whence all our conceptions of succession originally sprang, though it has been to some extent departed from. I have already said that the problem to be solved is, what becomes of the rights and obligations which are attached to a person when that person dies; and I have before [1] explained that these rights and obligations have been frequently conceived, not separately, but as a whole. And this mass or bundle of rights and obligations attaching to a man being conceived and dealt with as a whole, it has been natural to give to it a name. The name given to it by the Civil lawyers was *juris universitas*. Sir Henry Maine has thus explained this term [2]:—'A *universitas juris* is a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person. It is as it were the legal clothing of some given individual. It is not formed by grouping together *any* rights and *any* duties. It can only be constituted by taking all the rights and all the duties of a particular person. The tie which so connects a number of rights of property, rights of way, rights to legacies, duties of specific performance, debts,

[1] Supra, sect. 131. [2] Ancient Law, first ed., p. 178.

obligations to compensate wrongs—which so connects all these legal privileges and duties together as to constitute them a *universitas juris*, is the *fact* of their having attached to some individual capable of exercising them. Without this *fact* there is no university of rights and duties. The expression *universitas juris* is not classical, but for the notion jurisprudence is exclusively indebted to Roman law; nor is it at all difficult to seize. We must endeavour to collect under one conception the whole set of legal relations in which each one of us stands to the rest of the world. These, whatever be their character and composition, make up together a *universitas juris*; and there is but little danger of mistake in forming the notion, if we are only careful to remember that duties enter into it quite as much as rights. Our duties may over-balance our rights. A man may owe more than he is worth, and therefore if a money value is set on his collective legal relations he may be what is called insolvent. But for all that the entire group of rights and duties which centres in him is not the less a *juris universitas*.'

Ownership originally corporate.

549. It has also already been intimated[1] that according to the first notion of society, certainly according to the first Aryan notion, ownership was not individual, but corporate. Property belonged not to an individual, or a determinate set of individuals, but to an aggregate of indeterminate persons, such as a family or tribe. But such corporate ownership is just the case in which the difficulty about succession vanishes. The rights and obligations are in this case attached to the corporate body, and the existence of the corporate body to which the rights and obligations are attached is in no way affected by the death of the individual members of the corporation.

[1] Supra, sect. 467.

Succession to corporate ownership.

550. Nor is this view of succession confined to those corporations which are composed of an aggregate of individuals, such as a family, or a municipality, or a trading company. Precisely the same takes place where the corporation is represented by a single individual, or, as it is termed in English law, is a corporation sole; such as the king, the parson of a parish, or the priest (*shebait*) of a Hindoo idol. It is not the particular incumbent of the office in whom the property is vested, and to whom the obligations attach; it is the Crown, or the Church, or the Deity; or some abstraction of that kind, of which the king, the parson[1], or the *shebait* is only the representative.

Transition to succession to sole ownership.

551. [2]Now once having seized the idea of a *juris universitas* and of a corporation, especially of a corporation sole, there need not be any difficulty about mastering the conception of succession. There is a reasonable probability that the idea of individual succession grew out of the idea of corporate succession, and, although the transition is considerable, there is no reason to suppose that it was a violent one, or that it was even perceived. The corporate ownership of the family no doubt contracted to the individual ownership of the father, not suddenly, but gradually: and so too with succession. The father had been the sole manager and representative of the family whilst ownership was still corporate; and whether one individual succeeded another as owner, or as manager, would not become apparent until long after rights of individual ownership had become well established

[1] So called because he is said *vicem seu personam ecclesiae gerere.* Coke upon Littleton, fol. 300; Blackstone, Commentaries, vol. i. p. 384.

[2] I may here refer generally to Maine's Ancient Law, chap. vi, where the early history of testamentary succession is most ably and learnedly discussed.

and familiar. A change from corporate to individual succession, therefore, like the corresponding change from corporate to individual ownership, would produce no external change of itself; and one transition would proceed as an unconscious development of the other. There was, it is true, a new question to be solved, but it is very likely that nobody asked it; and no one even if it had been asked would have doubted about the answer. There was nothing to be done except to let things go on as before. The old head of the family being dead, the new heads of families would take his place; whether as representatives only of their respective families, or on their own behalf, would make no external difference. It was only after the notions of personal obligation and personal ownership had been fully established, that it would occur to any one to ask, how, when the person is dead, can the rights and obligations which were attached to his person continue? Then only would the continuation of his existence in the person of his heir come to be questioned; and the doubt, if necessary, resolved by a fiction.

Continuation of existence of ancestor in person of heir.

552. It appears to me, however, at least open to question, whether the continuation of existence in the person of the heir, which we now call a fiction, was not in earlier times stated as a solemn physical truth. It is difficult otherwise to account for the broad and general terms in which this continuation is appealed to as a fact; not only by Roman lawyers, but by lawyers of other countries. The Hindoo lawyers when discussing the rights of succession seem to assert the physical identity of father and son, and also of father and daughter quite as strongly; and, whenever they have to deal with a disputed question of succession, treat this identity as a self-evident truth. Thus Menu says:—'The son of a man is even as himself, and as the son is, such is the daughter. How, then, if he have

no son can any inherit but the daughter, who is closely united with his own soul?'[1] Nay, even when dealing with the rights of a widow, the great contest as to her right of succession seems to have been settled by the observation that 'Of him whose wife is not deceased, half the body survives. How then should another take his property while half his person is alive?'[2] Similar strong expressions of complete physical identity also occur frequently in the Bible. The legend of Eve having been formed out of a rib taken from Adam; the latter's exclamation on seeing her, 'This is now bone of my bone, and flesh of my flesh;' and the frequent repetition[3] of the expressions by blood relations that they are to each other as bone of the bone and flesh of the flesh, even by those connected through females, are at least very remarkable.

552 *a*. Continuation of the existence of the ancestor in the person of the heir is, it is true, not the only ground of inheritance recognised by the Hindoo lawyers of the Bengal school. The notion that spiritual benefits are conferred by the heir upon the ancestor enters largely into their conception of succession. This notion is based upon three assumptions:—(1) that the deceased is benefited by his wealth being expended on the performance of certain ceremonies; (2) that it will be so expended;

[1] Chap. ix. verse 130.

[2] Dayabhaga, chap. xi. sect. 1. verse 2. But the strongest passage of all, perhaps, is in the Mitacshara, chap. i. sect. 3. verse 10: 'The woman's property goes to her daughters because portions of her abound in her female children; and the father's estate goes to his sons because portions of him abound in his male children.'

[3] Genesis, chap. ii. verse 23; Id. chap. xxix. verse 14; 2 Samuel, chap. v. verse 1; Id. chap. xix. verses 12 and 13; Judges, chap. ix. verse 2; 1 Chronicles, chap. xi. verse 1. In Genesis, chap. v. verse 4, it is said, 'He that shall come forth out of thine own bowels shall be thine heir.'

(3) that the extent of the benefit depends on the relationship of the deceased to the person who performs the ceremonies. The last determines the order of succession. The second was, of course, only applicable to the scanty wealth men formerly used to leave behind them, and though the ceremonies are still performed somewhat lavishly, they do not absorb nearly all the accumulated property of the deceased. It is not improbable that the original practice was to apply all the available wealth of the family to the performance of family ceremonies and the perpetuation of family *sacra*; and thus what was originally a mere family duty has become a profitable right. Though from a legal point of view it has now dwindled into a fiction, it was once real; and it still supplies a not unjust rule of inheritance, based mainly upon propinquity and a preference of males to females [1].

552 *b*. But in the Mitacshara, which is supposed to be older than the Dayabhaga, and is of far wider authority [2], the right of succession is nowhere placed upon the ground of spiritual benefits conferred. The author of this treatise rests his propositions for the most part upon the bare rule of propinquity; and though he recognises the offering of funeral oblations as a distinctive mark of one class of relations (*gotraja*) and perhaps of others, he does not treat this as an essential condition. He has apparently heard of the notion but rejects it; as well as the more general assumption that accumulated wealth can only be used for religious purposes [3]. This is probably the reason why the author of the Dayabhaga discusses and defends the doctrine of spiritual benefits at such great length. I may observe

[1] See Dayabhaga, chap. xi. sects. 5 and 6.

[2] Colebrooke's Law of Inheritance, Preface, pp. iv. and xii.

[3] See Mitacshara, chap. ii. sect. 3. verse 4, and sect. 5. verse 1; and compare sect. 1. verse 14, with the following verses 22, 23.

that the authors of both treatises consider the little that Menu says upon the subject favourable to their views[1].

Testamentary succession.

553. So far we have only dealt with the origin of the conception of intestate succession. But there exists also testamentary succession; that is to say, succession in which the person to succeed is determined by a declaration of the will of the deceased person. This, Savigny[2] says, also rests upon a fiction; the fiction being that the deceased person continues to act beyond the period of his own death. If the testamentary power was really due to such a strange fiction as this, to which no physical conception ever corresponded, we could only wonder at it. By a metaphor it may be said that a man 'being dead yet speaketh;' but the words of a dead man can hardly originate binding obligations. Nor do I know of any foundation for the statement that any such fiction was the *origin* of testamentary law[3]. All the testamentary power in the world can be traced either to the Roman law or to distinct legislative enactment. But did the Roman law know of

How far founded on fiction.

[1] See Menu, chap ix. verse 186 sqq., and compare verses 106 and 142. See also Mitacshara, chap. ii. sect. 3. verses 3 and 4; and Dayabhaga, chap. xi. sect. 3. verse 6 sqq.

[2] Syst. des heutigen Römischen Rechts, sect. 57.

[3] It is perhaps in this way that the fiction is traced to the Roman law. It was said by Modestinus (Digest, Book xxxi. sect. 36) that 'a legacy is a gift left by will;' this in the Institutes (Book ii. tit. 20. sect. 1) is changed into 'a legacy is a kind of gift left by a person deceased;' and this has been again transformed into 'a will is a gift by a person deceased.' It has been pointed out by Windscheid (Lehrbuch des Pandekten-Rechts, sect. 623. note 2) that the word 'gift' is not used in the passage of the Digest above quoted in its proper sense; and both the etymology and history of *legatum* indicate a totally different origin. See Smith's Dictionary of Antiquities, *s. v.* Moreover the history of the Roman law shews that the formalities necessary to a transaction of gift were got rid of, not by the fiction that one of the parties to the transaction was a dead man, but by special exemption of this particular transaction from the ordinary rules.

any such fiction? The authority for a Roman will was itself to be found, either in the express assent of a body having legislative powers, or in the broad and sweeping maxim legislatively declared in the Twelve Tables that every man might dispose of his property as he liked[1]. The shifts and contrivances of Roman lawyers were, not to obtain the testamentary power, which they had got, but to get rid of the forms and restrictions which were imposed upon all alienations whatsoever, whether testamentary or *inter vivos*, and which in the case of testaments were felt to be peculiarly irksome. This was done by a variety of methods, but none of which, as far as I am aware, depend upon the fiction of enforcing obedience to a dead man's commands. It may be that this expression figuratively describes what actually takes place under modern testamentary law: and there is also a vulgar notion that it is a sacred duty to yield implicit obedience to the wishes of the dead. It is further extremely probable that this notion, fostered, as no doubt it was, if not created by the Church, in some measure accounts for the great latitude sometimes allowed to testamentary dispositions. But this is not the authority on which testamentary disposition rests: nor is it the origin from which it is historically derived.

Law of succession in India.

554. The law of succession as developed under the combined influence of Brahminical law and the decisions of English judges in India presents features of remarkable interest. Starting, apparently, from the same point as the law of Europe, namely, the corporate ownership of families, and conceiving, as I have already shewn, quite as strongly the physical unity of kindred, the question of succession presented even less difficulties to the

[1] *Uti legassit super pecuniâ tutelâve suae rei ita jus esto;* Ulpiani Fragmenta, tit. 11, 14. See Maine's Ancient Law, first ed., pp. 201, 202.

early Hindoo lawyer than to his fellow-labourer in Europe. There is this broad distinction between the family-law of the East and of the West. From very early times, on the death of the head of a family at Rome each son became the head of a new family, and there were as many new families as the deceased left sons surviving him. But this was not the case in India in earlier times, and is not so even now. Throughout India, when the father dies, the family continues single and intact. If he were a sole owner, all his heirs become co-owners with each other, and so remain until a distinct act of separation takes place; and (which is most important) the feeling is rather against than in favour of such a separation. If the father was himself a member of a joint family, all his descendants are so too; the property before and after his death being held in common. Thus numerous changes in the membership of the family may take place, and even a new family may be founded without any external change whatever. Individual rights exist, but it is only in case of collision between the members of the family, leading to a disruption, that the question as to individual rights arises; and then it first becomes really important that the members are co-owners and not corporate owners. The change, therefore, from corporate ownership to individual ownership was a much more subtle one in India than at Rome; and though the rights of the individual members to their shares is clearly established in Bombay, Madras, and the southern portions of Bengal, there is one district[1] in which it may at least be said that, so long as the family remains joint, their rights are doubtful. This explains the curious place that the law of succession occupies under Hindoo law. We, in Europe, are accustomed

[1] This is the Mithila district of Bengal, where the law is in a very unsettled condition.

always to deal with the law of succession as connected with the rupture of the family by death; the Hindoo lawyers deal with it as connected with the rupture of the family by partition. It might be said that there is in fact no Hindoo law of succession, but only a law of partition. The two great treatises which Colebrooke has translated, and which are commonly said to contain the Hindoo law of inheritance, really deal with a subject for which the Sanscrit term is *dayabhaga*; and this, as the authors of both treatises are most careful to explain, means, not inheritance, but the partition of wealth [1].

Origin of succession incorrectly stated by Blackstone.

555. It is not necessary for me to trace here the successive steps by which the Roman lawyers tardily arrived at the notion that a will in the modern sense of the term could be made: that is to say, that a man could dispose of his property to whom he pleased, and in any way he pleased, by means of intentions formed in his lifetime, but which remained until his death both secret and revocable [2]. It is however remarkable that towards the end of the last century the true history of succession, both intestate and testamentary, seems to have been almost wholly forgotten and ignored. Blackstone [3], who was thoroughly acquainted with the ideas current in his day, speaks of succession as a contrivance which would naturally suggest itself at all times and in all countries to remedy the inconvenience which would occur, if (as he considers would otherwise be the case) the property of a deceased owner became vacant, and could be seized upon by the first comer: and he treats intestate succession as a supple-

[1] Dayabhaga, chap. i. sects. 1-5; Mitacshara, chap. i. sects. 1-6.

[2] The reader is referred for this information to Maine's Ancient Law, chaps. vi, vii.

[3] Commentaries, vol. ii. pp. 10, 12, 489. It is, as usual, not easy to reconcile all that Blackstone says upon the subject.

mentary contrivance in order to meet particular cases of neglect or disability on the part of the deceased owner.

Effects of this in India.

556. This is, of course, mere idle speculation; but it was the current view when Blackstone's treatise was published. Nor has it been without important practical consequences. When we began to administer the law in India, we did in fact come in contact with a people amongst whom true wills were as yet unknown; but who, in spite of their usual strict adherence to their own laws, were by no means unwilling to acquire this important extension of the rights of the present generation. It is very curious now to read the arguments by which the testamentary right was supported and opposed. All through the discussion testamentary dispositions of property are treated as if they stood exactly upon the same grounds as gifts of property *inter vivos;* and the whole discussion turns upon the question, whether such alienations are allowed. The distinction between a man alienating property by gift during his life, and disposing of it by gift after his death, seems to have been wholly ignored. The constant assertion is, that wills must be looked upon as gifts made in contemplation of death: quite forgetting to enquire whether gifts made in the way in which wills are generally made were valid by the Hindoo law, even if the greatest latitude of alienation were allowed to living persons. This defective reasoning could have deceived no one who had considered it from this point of view: and the real cause why it gained acceptance must have been the then inherent notion that wills were so natural an expedient, that the recognition of them was almost a matter of course, when the right of alienation was established.

Distinction between a will and gift *inter vivos.*

Identity of them still sometimes insisted on.

557. Many years later the validity of a Hindoo will was again questioned before the Privy Council. Wills

had then been in use in India upwards of seventy years, and had been expressly recognised by the legislature [1]. Notwithstanding this, it appears to have been thought necessary, perhaps in order to disavow innovation, again to protest that a testamentary disposition did not differ in principle from an ordinary gift [2]. A pretence was even made of testing the validity of the gift in that particular case, by the analogy of the actual law of gifts. To a gift it was said, there must be a living donee—*ergo*, a gift to a person unborn is invalid. Surely with equal force it might have been said, to a gift there must be a living donor—*ergo*, a gift by a dead man is void. If, again, as is there said, the law of wills is simply but wrongly a development of the law of gifts, by carrying on the gift up to death, why is it that the *donatio mortis causâ* has been developed as a distinct transaction? and how have the formalities which are necessary to this form of donation come to be dispensed with in wills? The whole law as to *donationes mortis causâ* is based upon the

[1] Regulation 5. of 1799, sections 1, 2.

[2] See the case reported in the Bengal Law Reports, vol. ix. p. 377. The passages to which I refer are at pages 397, 398. The Privy Council there describe a will as 'a disposition of property to take effect upon the death of the donor;' and say that such a disposition 'though revocable in his lifetime is, until revocation, a continuous act of gift up to the moment of death and does then operate.' If I understand the reasoning rightly it is meant, not only that the act should be continuous until death, but that it must be continued until at least one moment *after* death; and so Savigny evidently thought; supra, sect. 553. If this be not so, then a will is still a transaction *inter vivos*, and the difficulty about getting rid of the rules which regulate such transactions is not avoided. Of course making a will to be a gift by a deceased man was not necessary to the view the Privy Council were seeking to establish as to the limitations upon the testamentary power. In fact those limitations come out all the stronger the more we look at a will as a special transaction standing by itself.

supposition that, generally, a mere one-sided declaration of intention by the owner of property, upon which nothing is done, effects nothing. The *donatio mortis causâ* would be an impossible halting-place if the law of wills had been a development of the law of gifts, in the sense that one may be inferred logically from the other.

and disadvantageously.

558. Nor do I see, if wills are to be conceived as gifts by the deceased not made in his lifetime, how they can be defended against the imputation of absurdity. They can always then be attacked as Mirabeau attacked them. 'There is as much difference,' he said, 'between what a man does during his life and what he does after death as between death and life. What is a testament? It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property: it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law[1].' From the point of view taken these observations are unanswerable. The testamentary power carefully guarded and restrained may not be an absurdity; but it would be so if it were, as Mirabeau views it, and as Savigny and some English lawyers have represented it, nothing more than a dead man's expression of desire. The real answer to all such objections is that, politically, the power of testamentary disposition rests, like every other institution of law, on habit and convenience, backed by authority; historically, it has grown, like other law, partly out of the expressly declared will of the supreme power, partly out of judicial decision, and partly out of custom.

Succession in England.

559. Having now given some idea of the methods by which the problem of succession was originally solved,

[1] Bulwer's Historical Characters, vol. i. p. 114.

I proceed to consider the legal conceptions which it at present involves: and I will first deal with the succession to moveables.

560. It is not necessary to attempt here a complete history of the English law of succession to moveables. That history is involved in considerable obscurity, and is, in fact, the history of a very long and very severe contest. In this contest the Church took a very active part, and succeeded at one time in obtaining, together with some pecuniary advantage, considerable influence over the law applicable to succession, as well as some share in its administration. Hence the English law of succession in the case of moveables has been in a great measure based upon the Roman law, to which the Church generally adhered. And though the principles of this law have been freely modified by the temporal courts, which have long since re-established their exclusive jurisdiction in all points of real importance, it still remains the best way of considering the English law of succession to moveables to treat it as an offshoot of the Roman law.

Obscurity of history of English law.

561. One of the salient principles of the Roman law of succession (as will be readily understood after the observations I have made upon its origin) was, that the succession dealt with was a universal one. What passed directly from the deceased to his heir or heirs was the whole aggregate of his rights and obligations. Every heir took either the whole or a share of that aggregate—a half, a third, a fourth, as the case might be: and it was an absolute rule of Roman law that this devolution should be complete, immediate, and unconditional. No device could get rid of this rule, and every scheme for securing to particular individuals particular portions of the property, or for carrying out particular wishes of the deceased, had to be framed with strict caution not to violate this principle.

Succession under Roman law universal.

Thus a legacy could not be given direct to the legatee, but the thing bequeathed went to the heir, from whom the legatee could claim it. So if a man desired that any portion of his property should be held and enjoyed in a special manner, he could not separate that portion from the common stock, but could only lay his heir under the obligation to carry out his wishes.

Partly so with us in the case of moveables.

562. This view is partly adhered to in the English law. On the death of a person the whole of his moveable property passes *en bloc* to his executors if he die testate, to his administrators if he die intestate; and the same persons are liable for the debts of the deceased. Indeed, under the English law, the principle has in one respect been somewhat unreasonably extended; I ought perhaps to say, distorted. Even the blood relations of an intestate, or the universal legatee of a testate, do not, under the English law, take his property directly, but only indirectly through the executor or administrator. This can only have been because the Church thrust itself between the deceased person and his successors, and insisted upon treating the administration of the estate as in all cases dependent upon its own authority, exercised through the administrator or executor, as the case might be. Of course for this there was no authority in Roman law.

No partition allowed.

563. Under the English law there cannot even be a partition of the inheritance: the representatives, if there be several, cannot be made owners of shares, but must be together one single owner of the whole: whereas, under the Roman law, if there were several heirs, each was owner of his own share. There is a good reason why in this respect the Roman law has not been followed. A separation of the inheritance must lead to difficulties about the administration of the estate, and we find that in countries which have adopted the Roman law, the

testamentary heirs are frequently placed by the testator under the control of a single person.

No privity between deceased and heir or legatee of moveables.

564. It follows, of course, from what has been now said, that between the heir, or the legatee, and the deceased there is, under the English law, in the case of moveables, no privity whatsoever. At the death, neither the heir[1] nor the legatee has a right to claim any portion of the moveable estate; they are not liable for anything; they do not in any way *succeed* to the deceased. The whole of their right consists in this,—to call upon those who are administering the estate to proceed according to law. The nearest approach to an exception to this principle is in the case of the legacy of a specific thing; if the executor appointed by the will have assented to a legacy of this description, the thing belongs at once to the legatee. In all other cases the only remedy is by a bill in Chancery for the administration of the estate.

Liability of moveable estate to debts.

565. It was an immediate deduction from the Roman idea of succession that the heirs, whether of a testate or intestate person, were liable to pay all the debts and fulfil all the obligations of the deceased whom they represented. The succession being a universal one, there was no distinction between the assertion of a claim and the submission to a liability. Consequently, an heir might find himself in a very serious position; that he had more to pay than to receive; that the claims on the estate were greater than the assets. Upon this ground he was allowed a reasonable time to reflect and decide,

[1] I use the word 'heir' to designate the person who is entitled beneficially to the moveable property of an intestate. As pointed out *infra* (sect. 570), there is in England, properly speaking, no hereditary succession to moveable estate, but I am obliged to find some designation for the person who really gets the benefit of it.

whether or no he would accept the inheritance. Having once done so, he was personally bound by every obligation of the deceased which was not by its nature incapable of being transferred from one person to another. This led to great inconvenience; first, on account of the delay which took place whilst enquiries were being made, and secondly, on account of the frequency with which inheritances of doubtful solvency were refused by the heirs.

Benefit of the inventory.

In order to avoid this inconvenience, what has been known as the 'benefit of the inventory' was introduced by a constitution of Justinian[1]. The provision was that, if in compliance with certain forms, and within a certain time, a complete inventory of the property of the deceased was made and filed in the proper office by the heir, and this property was kept entirely separate from the property of the heir himself, then the heir could claim exemption from liability for any claims of the deceased which the assets were insufficient to satisfy. The heir, however, had to give notice before he entered upon the property that he intended to claim this exemption; and he forfeited his protection, if he did not deal with the property honestly for the benefit of all parties concerned. This is, in substance, the general law at the present day throughout the continent of Europe.

Liability of executor and administrator for debts.

566. In England the liability to the debts of the deceased person has got somewhat displaced from its natural coincidence with the reception of the assets of the estate. The legatees and next of kin having no direct connection with the deceased, and not being his representatives, have nothing to do with his debts, the liability to which falls entirely on the intermediate functionary, the executor or administrator. Nor is the position of either of these identical with that of the Roman heir,

[1] Cod. Just. Book vi. tit. 30. sect. 22.

although our law is clearly traceable to a Roman source[1]. It seems that originally an inventory was required from the executor or administrator in every case before he was put in possession of the property; and it was considered a matter of course that he got the 'benefit of the inventory,' without the necessity of his putting in any special claim to it. But gradually the practice of putting in an inventory fell into disuse, or dwindled into a mere form; whereas the benefit which had originally been conditional upon the faithful performance of this duty was nevertheless retained[2]. So that without furnishing any inventory at all, executors and administrators are now exempt from all personal liability except for the due administration of the estate: and they only become personally liable if they violate or neglect their duty, and are guilty of what is called a *devastavit*, or 'wasting the assets,' in which case they must answer out of their own pocket; not however even then for the whole claim, but for what they had, or might have had of the property of the deceased[3].

Under Roman law consent of heir necessary to succession;

567. Another essential principle of the Roman law, likewise dependent upon the idea of personal succession, was, that there was no interval or breach at the death of the deceased, but the heirs at once stepped into his shoes. It was the same idea as is expressed in our maxim that 'the king never dies.' On the other hand, however, the

[1] Williams on Executors, sixth ed., p. 912; compare Erskine's Institutes of the Laws of Scotland, Book iii. tit. 9. sect. 41.

[2] There has however always been a tendency, and it is just now perhaps a growing one, to treat the 'estate' itself as liable to the debts; making the estate a sort of juristical person; and it would not be difficult to bring our law into this view. Recently where a testator died having an interest in an uncompleted contract, Sir William James spoke of his estate as being 'a co-contractor' in the business. Law Reports, Chancery Appeals, vol. ix. p. 343.

[3] Williams on Executors, sixth ed., p. 658.

consent of the heir was necessary to the vesting of the inheritance: until the inheritance had been accepted it did not belong to the heir. There was, therefore, a conflict between the theory and the fact: there was a space of time, very often a considerable one, during which, whatever the theory might be, the inheritance did in fact belong to no one. This difficulty was partly got over by the doctrine of 'relation back,' as it is called: that is to say, the heir, though he was not really heir before he accepted, yet, when he accepted, was treated exactly as if he had succeeded immediately on the death of the owner. Still the difficulty remained, that in the interval the inheritance was vacant, which might give rise to practical inconveniences which no fiction could remedy. The common method of meeting this difficulty was by the appointment of a person for the intermediate custody and management of the property.

but his title related back.

568. The state of the English law upon this matter is somewhat peculiar. We frequently find it laid down positively, that an executor derives his title directly from the will; that the property vests in him from the moment of the testator's death; and that the probate is only evidence of title, and not the title itself. That to some extent, however, this statement is not the assertion of an actual fact, but of a legal fiction, is evident, I think, from the following considerations:—It is perfectly true that an executor derives his title directly from the will in this sense, that the inheritance passes immediately to the executor from the testator, and not, as in the case of an administrator or a legatee, through another person. It is also true that the only use of probate is to satisfy a rule of evidence, and that the grant of probate confers no right whatever. But still the property does not, in fact, vest in the executor at the moment of death. As, under the Roman law, it does not vest until some act has been done, which is equivalent

Acceptance by executor also necessary.

to an acceptance of the inheritance, and the commonest mode of acceptance is the application for probate, though any intermeddling with the estate is sufficient for that purpose.

569. If this were not the correct view of the position of an executor, another position taken by English lawyers would be wholly unintelligible. The same authors who tell us that the inheritance vests in the executor at the moment of death, speak of the relation back of the title of the executor from probate to the death of the testator[1]. The only possible explanation which I can conceive of this language is, that when the executor, by applying for probate, unequivocally accepts the inheritance, the inheritance is then assumed to have vested in him at the death of the testator. If it had already really vested in him, then there could be no relation back at all. So also the distinction that, if the first executor die after proving the will, the inheritance passes on to his executor, but if he die without having proved the will, it passes to the ordinary who must grant administration, seems to me only capable of explanation upon the assumption, that the inheritance had never vested in the executor who had not expressed his assent by applying for probate. It may be that this assumption was not always quite correct, as Lord Holt pointed out[2]; but the only error would be one of fact, in disregarding all other acceptance than that by application for probate. The principle of law upon which the ordinary acted in granting administration, namely, that the inheritance had never vested in the executor who had not accepted, was correct, and has always been

His title also relates back.

[1] Broom's Commentaries, first ed., p. 616. See also the language of Lord Denman, Adolphus and Ellis' Reports, vol. x. p. 212.

[2] Salkeld's Reports, vol. i. p. 308; Williams on Executors, pp. 245, 282.

acknowledged. It is also upon the same principle that if an executor renounce, and administration be granted, no assent or assignment by the renouncing executor is necessary.

No heir to moveable property of intestate.

570. The relationship between the deceased person and his executor is wholly different from that of the deceased person and his administrator. The executor is the heir of the deceased; the inheritance passes to him directly; and he represents the deceased. Strange as it may seem, yet it is true that, in contemplation of our law, a person who dies intestate has (strictly speaking) no heirs of his moveable property. Down to the year 1857 his property passed to an ecclesiastical functionary called the ordinary: now it passes to the Judge of the Court of Probate[1]. There is no necessity to enter here into the enquiry how the extraordinary view came to be taken, that the property of all deceased persons vested in the ordinary; especially in a country not always prone to submit to ecclesiastical authority. It no doubt had its advantages. In all probability, no other person would have shewn any respect whatever for the rights of others, which the ordinaries always did to some extent; though it was not without considerable resistance that, what we should call the obvious rights of the kindred of the deceased and of claimants upon the estate, were fully recognised.

It passes to the ordinary.

Ordinary, how controlled.

571. The English law has, however, been brought round to a reasonable condition, not by altogether expunging the idea that an intestate person leaves no heirs, but by controlling the ordinary. The 13 Edward I, statute 1, c. 19, directed the ordinary to pay the debts of the deceased, which plain duty it appears that the

[1] 21 and 22 Vict. chap. xcv. sect. 19.

Church was disposed to neglect. But the most important changes were introduced by the 31 Edward III, statute 1, c. 11. Prior to that statute it had been customary for the ordinary to appoint officers of his own to administer the property of the deceased. The person so appointed was a mere agent of the ordinary, subject to the usual rules of agency; and of course possessing only such powers as the ordinary chose to give him. The statute of Edward III, however, contained three very important provisions: (1) it compelled the ordinary to depute, not any person he chose, but the nearest of kin to administer the estate; (2) it gave to the persons so deputed the same right as executors have to sue in their own names to recover debts due to the deceased, which right, strange to say, the ordinary never had; (3) it made the persons so deputed liable to be sued in their names for the debts of the deceased.

Property now vests in the administrator.

572. This statute was also interpreted to imply, though it is not expressly so said, that the property of the deceased became vested in the administrator in the same way as in the executor; and it would have been also a legitimate inference, as well as one which would greatly have simplified the law, if, having so far assimilated the position of an executor to that of an administrator, it had been further held that the administrator, like the executor, directly represented the deceased, and that his title commenced from the moment of the intestate person's death. This, however, was not done. The administrator was still looked upon as only an 'officer of the ordinary[1],' though in what sense he could still be so called it is difficult to say: for the ordinary had no control, or

But he is still called the agent of the ordinary.

[1] Blackstone's Commentaries, vol. ii. p. 496; Williams on Executors, sixth ed., p. 388. The view is absolutely erroneous. If he were only an agent how could he be the owner of the property?

next to none, over his appointment; and he held rights which the ordinary was unable to confer. Nevertheless, the doctrine is still adhered to that administrators derive their title solely from the grant of the administration to them by the ordinary: although, to remedy glaring injustice, administrators are sometimes dealt with in special cases *as if* their title also related back to the death of the deceased.

Administrator originally took the surplus himself.

573. The result of the statute of Edward III being to give the inheritance entirely to the administrator, and no liabilities being imposed upon him except to pay the debts of the deceased, the right to the grant of administration in a solvent estate was one of very great value; for the person who, as next of kin, was entitled to the administration under the statute took for his own benefit the whole of the surplus proceeds of the estate[1]. This was certainly an unsatisfactory result. Prior to the statute, when the estate was administered by the Church, the widow and children had always in practice, if not by absolute right, got each their *pars rationabilis*, a half or a third according to circumstances[2]. Now all went to a single relative, and those for whom it was a duty to provide would thus frequently be left penniless. The Church, which had always fought strenuously for the rights of the widow and children, and had succeeded in establishing their rights to some extent, naturally enough made an attempt to prevent this disastrous result of the statute. The ordinaries began to take bonds from administrators as to how they would administer the estate, by which bonds a provision for the widow and the children was secured. This, however, the Courts of

Origin of administration of bonds.

[1] Williams on Executors, sixth ed., p. 1372.

[2] Williams on Executors, sixth ed., p. 387; Maine, Ancient Law, first ed., p. 244.

Common Law prohibited as a usurpation, as it probably was[1].

574. But at length the Statute of Distributions[2] sanctioned the practice, and even made it compulsory on the ordinary, in every case, to take a bond from the administrator to exhibit an account to the ordinary shewing the surplus (if any) after the assets were collected and debts paid; which surplus the ordinary was directed to distribute amongst the next of kin, according to the rules therein laid down. Statute of Distributions.

575. Considering the pretensions which the Church had successfully put forward, and the language of the various statutes, in which those pretensions, whilst they are modified, are still recognised to a considerable extent, it would seem to have been almost inevitable that all matters connected with the administration of the moveable property of deceased persons, both testamentary and intestate, would fall into the hands of the Ecclesiastical Court. But this has not been the case. The Court of Queen's Bench has always prohibited the Ecclesiastical Courts, whenever any attempt was made by the latter openly to exercise functions which were not merely ministerial. These prohibitions would scarcely, however, have been effectual had it not been for the fatal defect in the procedure of the Ecclesiastical Courts, that they had no process by which to enforce their judgments[3]. They had possessed such a process, and a very formidable one it was at one time, being nothing less than excommunication. They possess in name the power of excommunication still; but it is a threat, and a threat only; and as a threat it has lost Weakness of the Ecclesiastical Courts.

[1] Williams on Executors, sixth ed., p. 1372; Blackstone's Commentaries, vol. ii. p. 515.

[2] 22 and 23 Charles II, chap. x.

[3] Blackstone's Commentaries, vol. iii. pp. 101, 102.

nearly all its terrors. It is true, as Blackstone says, that to prevent these courts falling completely into contempt the common law lent a supporting hand to their otherwise tottering authority. It would, however, be perhaps more correct to say that they were handed over to the tender mercies of a jealous rival, who only assisted them at the price of their complete submission.

Succession to immoveable property

576. I now pass to the consideration of the law of succession to immoveable property, and we find the change of ideas to be very great indeed.

entirely distinct from succession to moveable.

577. The law of England has not only drawn the distinction between moveable and immoveable property differently from other countries in Europe, but it has made that distinction wider. In no other country do we find two perfectly distinct bodies of law governing the succession to the two different sorts of property. This is, however, the case in England. In considering the law of succession to immoveable property we must begin entirely *de novo;* not a word that is said about the succession to moveable property is applicable to immoveable property, and *vice versâ*. The whole conception is different from beginning to end.

Testamentary dispositions of land formerly not allowed.

578. Moreover, whilst we are far from being able to trace the law of succession in the case of moveables with clearness and continuity, in the case of immoveables its history is buried in the deepest obscurity. A few isolated conclusions is all that has been arrived at by enquirers. 'The primitive German or allodial property,' says Sir Henry Maine, 'is strictly reserved to the kindred; not only is it incapable of being disposed of by testament but it is scarcely capable of being alienated by conveyance *inter vivos*[1].' All property, however, even all landed

[1] Ancient Law, first ed., p. 198. Bluhme (Encyclopädie, sect. 513) quotes this curious old German rhyme :—

property, was not allodial; and to property not allodial the same strictness did not extend; and there are also indications that the rules applicable to non-allodial land were gradually extended to all lands. These rules were the result of successive importations from the Roman law which, combined with certain barbarian ideas, formed the feudal system[1]. Out of this emerged the law of landed property, the actual state of which in England at any one time cannot be described for any period earlier than the time of Henry II. At about that time it may be said to have become settled law, that all land descended to the eldest son; and to the son of the eldest son, if the eldest son died in the lifetime of his father; that in default of direct descendants collaterals came in, and their representatives; that during his lifetime the owner might dispose in some cases of his purchased lands, and a portion (not the whole) of those which came to him by descent; but he had no power to dispose of lands by will[2].

Introduction of uses.

579. Testamentary dispositions of landed property, like so many other considerable alterations in our law, were introduced by the invention of uses. I do not propose here to trace the history of that invention further than to point out that its origin is not (as has been supposed) to be found in the Roman law, either in the *fideicommissum*, or, as the name might seem to indicate, in the *usus*. I have elsewhere[3] shewn what the Roman *usus* really was, and that it had nothing to do with equity. The *fidei-*

'Wer seelig will sterben,
Schall laten vererben
Syn Allodi Gut
Ant' nächst gesippt Blut.'

[1] Maine's Ancient Law, first ed., p. 296.

[2] Reeves' History of the English Law, chap. ii.

[3] Supra, sect. 305, 393.

commissum was, it is true, in a certain sense an equitable obligation, but it did not produce what English lawyers call a use, or trust estate. The person upon whom the fiduciary relation was imposed was not bound, like an English trustee, to hold the thing for the use or benefit of another; on the contrary, he was bound to hand over the thing itself; from which time he lost all control over it, and it belonged absolutely to the person for whose benefit it was originally intended. In all systems of law fiduciary relations are well known and understood; other systems of law also exhibit the peculiarity of a special set of rules applicable to such relations. But the relation of trustee and *cestuique* trust as understood in the English Courts of Chancery is unknown in any other system in the world, except where we have introduced it, namely, in America, the English Colonies, and perhaps in India.

Devise of the use.

580. However, anomalous as it was, the use as an equitable right distinct from the land was successfully established; and moreover it was assumed, though, as far as I can see, there is nothing to warrant the assumption, that this was an interest with which only the Court of Chancery, and not the Courts of Common Law, could deal; and further, that in dealing with it the Courts of Chancery were not bound by the ordinary rules relating to landed property. Of course this easily led to the contrivance by which the right of testamentary disposition over land was substantially exercised. The land was conveyed to what was called a feoffee to uses; who at common law was the absolute owner. The uses were then declared in a will, and the Court of Chancery compelled the feoffee to carry out the intention. The statute of Henry VII, though unsuccessful as an attempt to put an end to uses, was considered to have put a stop to this mode of disposition; but almost immediately after-

wards an express enactment conferred an absolute right of alienation, both testamentary and *inter vivos*, upon all owners of land, with exceptions which have since become insignificant.

581. This being the origin of wills, and the statute [1] which created them so treating them, they were very naturally looked upon only as one form of alienation; and in fact wills have generally been considered in the English law merely as a species of conveyance, differing from an ordinary conveyance only in the solemnities which accompany their execution, and in some minor rules of construction which the nature of the transaction suggests. It must not be supposed, however, that there is here any fiction about carrying out the wishes of a dead man. The statute has provided that a gift, secret, revocable, conditional, and unaccompanied by all the necessary forms of a transfer *inter vivos*, shall be valid; and this, though contrary to general principles, of course the legislature was perfectly competent to do [2].

Devise of land treated as a species of conveyance.

582. In the case of land the degrees of consanguinity are calculated according to the rules, not of the Roman, or as it is usually called the Civil Law as in succession to

Intestate succession to land.

[1] 32 Henry VIII, chap. i.

[2] I have no doubt, however, that many persons still find any fiction acceptable which will disguise the legislative origin of rights of succession: I suppose because legislation on this subject appears to trench upon the sacred principle of non-interference with rights over property. I do not imagine that eminent lawyers would be seriously embarrassed by such scruples, but they sometimes feign a respect for them in argument, as in the case mentioned above (supra, sect. 557). And quite recently a very learned Judge delivering judgment in the House of Lords, supported his conclusions by the very curious suggestion that the Statute of Distributions was nothing more than the making of a will by the legislature for the intestate. Law Reports, Eng. and Ir., App., vol. vii. p. 66.

moveables, but according to the rules of the Canon Law[1]; of which peculiarity I have never yet seen any explanation. The difference between the two modes of computation is that whilst the Roman or Civil Law counts the number of degrees in both lines from the deceased person through the common ancestor to the heir, the Canon Law counts the degrees in one line only from the common ancestor to the deceased, or to the heir, whichever is furthest off. For instance, my first cousin is related to me in the fourth degree under the Roman or Civil Law, but in the second degree under the Canon Law. The other two peculiarities, namely, the entire exclusion of the ascending line and of the brothers of the half-blood, have both been removed by statute[2]. The difference in the mode of calculating the degrees however still remains.

Liability of heirs of land to debts of ancestor,

583. Nothing marks more clearly the wide difference between the ideas of succession as applied to moveables and as applied to immovables than the differences in the law as to the liability of heirs for the debts of the deceased. The strict notions of personal representation and continuance which are involved in the conception of succession carried this liability to the very utmost, making the heir in some cases even personally liable for the debts of the deceased. This, as we know, our own law has modified when applying the conception of succession to moveable estate, and the modification is just and reasonable. This conception of succession and strict personal representation has never been applied by us to immoveable property. Still it is difficult to account for the views which English lawyers at one time seem to have entertained as to the liability of those who have inherited land. It has indeed been said that in very ancient times the heir of land was liable

[1] Blackstone, Commentaries, vol. ii. p. 206.

[2] 3 and 4 William IV, chap. 106.

for the unpaid debts of his ancestor, and that the narrower rule which we find laid down by Britton in the time of Edward I, that the heir of land was liable if the deceased had specially bound him by the deed under which the debt was due, was a restriction due to feudalism[1]. This seems, however, to be mere conjecture, and no feudal reason can be assigned for the exception made in favour of debtors, when the heir was specially bound. It must be remembered, moreover, that in the period which immediately preceded the reign of Edward I, lands were not available even to the creditors of a living man at all; and I should rather be disposed to consider the rule laid down by Britton as a construction of the statute of Edward I[2] in favour of creditors, than a restriction on their rights.

584. Consistently with the idea that a devise by will under the statute was an alienation of the land, it was held that the creditors of the testator had no claim against the devisee. and of devisee.

585. Gradually, though very slowly, the principle has been established by express legislative provision that the heir is liable for the debts of the deceased, whether he takes under a will or by intestacy.

[1] Williams on Real Property, seventh ed., p. 74.

[2] 13 Edward I, stat. 1, chap. xix.

INDEX.

*** The numbers in the Index refer to the sections.

Administrator, agent of ordinary, 574.
— property vests in, 579.
Alienation of land, formerly prohibited, 467.
— what consent necessary to, 468.
— public policy favours, 469.
— private persons oppose, 469.
Allodial property, inalienability of, 578.
Ancestor, and heir, physical identity of, 552.
— spiritual benefits conferred on, by heir, 552 *a*.
— diversity of opinion in Hindoo schools, 552 *b*.
Ancestor and heir, no privity between, as to moveable estate, 564.
Animals, ferae naturae, right of capture of, 466.
Attachment, 521.

Blackstone, his erroneous notion as to transfer of ownership, 465.
— ignorant of history of law of succession, 555.

Cessio in jure, transfer by, 468.
Chancery law of security, 535, 542.
— might be extended, 538.
Contract, oldest Roman forms of, 500.
Corporate ownership, succession to, 549, 550.
— all ownership was originally, 467, 549.
Corporation sole, idea of, 550.
Creditor, and debtor, meaning of terms, 495.
— in possession of pledge, duties of, 517.
— power of sale how executed by, 519, 537.

Dayabhaga, meaning of term, 554.
Debtor, and creditor, meaning of terms, 496.
Debts, may be pledged, 512.
— liability of moveable estate to, 565.
Delivery, why necessary to transfer of ownership, 474.
— why not always now, 474.
— error of Heineccius as to, 474.
— error of Mr. Sergeant Manning as to, 474.
— rules of continental law as to, 476.
— still of great importance, 477.
Devisees of land, liability of, to debts, 584.
Distributions, Statute of, 574.

Easements may be pledged, 512.
Ecclesiastical Courts, weakness of, 575.
Executor, acceptance of, how far necessary, 568.

Ferae naturae, animals, right of capture of, 466.
Fictions, how far law of succession based on, 548.
— of continuation of existence of ancestor, 552 sqq.
— of will being a gift to heir, 553 sqq., 581.
Fideicommissum, not a use, 578.
Fiducia, 502.
— like an English mortgage, 503.
— useful form of security, 503.
— not always applicable, 504.
— defects of the proceeding, 505.
— only gave personal security, 505.
— power of sale extended to it, 511.
Foreclosure, abolished in the Roman law, 511.
Free tenants, cultivation by, 506.
French Code, rule of, as to delivery, 476, 477.

General security, 523.
Germany, rule in, as to delivery, 476, 477.
Gift, difference between will and, 553 sqq., 556.
Greek origin of *hypotheca*, 509.

Heir, and ancestor, no privity between, as to moveable estate, 564.
— acceptance of, how far necessary, 567.
— none to moveable estate of intestate, 570.
Heirs of land, liability of, to debts, 583.
Hindoo law of succession, 552 sqq.
— continuation of ancestor's existence, 552 sqq.
— treats succession under partition, 554.
Hindoo law, origin of intestate succession under, 554.
Hypotheca, origin of, 507.
— its agricultural character, 508.
— came from Greece, 509.
— identified with *pignus*, 509.
— only gave a personal security, 510.

Immoveable property, succession to, 576. See Succession.
Immoveables, pledge of, 536 sqq. See Mortgage.
— alienation of, 467. See Land.
Indian law of registration, peculiar, 492, 493.
Insecurity, of obligations, 494.
Insinuation, 478.
Interest, profits in lieu of, 517.
Intestate succession, origin of, 551 sqq.
— under Hindoo law, 554.
— to moveables, peculiarity of, 570.
— to land, 582.
— rules of canon and civil law, 582.
Invecta et illata, giving of, in security, 507.
Inventory, benefit of, 565.
Involuntary transfer of ownership, 460.
Involuntary pledge, 521.
Italian Code, rule of, as to delivery, 476.

Judge Ordinary, moveables of intestate go to, 370.
Jure, cessio in, transfer by, 468.
Jus, 546.

Land, originally not alienable, 467.
— right of alienation gradually extended, 467, 469.
— alienation of, consent necessary to, 468.
— will of, see Succession.
— pledge of, 536 sqq. See Mortgage.
— intestate succession to, 582.

Land, liability of heirs and devisees of, to debts, 583, 584.
Landlord and tenant, necessity for security between, 506.
Latifundia, introduction of, led to change in security, 506.
Legacy, sometimes said to be a gift, 553 note.
Lex Commissoria, abolished, 511.
Lien and pledge, distinction between, 530.
Lord Kenyon, defeated Lord Mansfield's attempt to improve common law of security, 539.

Maine, Sir Henry, his remarks upon occupancy, 465.
— his explanation of *juris universitas*, 548.
Mancipatio, transfer by, 468.
Mansfield, Lord, his attempt to improve common law of security, 539.
— defeated by Lord Kenyon, 539.
Mirabeau, his attack on testamentary succession, 558.
Mortgage, similarity of, to *fiducia*, 504.
— nature of, at common law, 536.
— in Chancery, 537.
Mortgagee, can always sell, 537.
Moveables, transfer of, 488.
— holder of security on, cannot always sell, 540.
— inconvenience of this, 541.
— extended notions of security upon, 542.
— succession to, 560. See Succession.
— no heir of an intestate, as to, 570.

Next of kin, how claim of, established, 571, 573 sqq.
Nexum, 500.
Notarial transactions, presumption in favour of, 480.
Notary, 480.
Notice, purchasers how affected by, 487.
Notice, cannot be accurately defined, 487.
— before exercising power of sale, 519.
— of when and where sale is to be held, 519.

Obligations, insecurity of, 494.
Occupancy, relation between, and ownership, 464.
— acquisition by, now rare, 466.
— capture of wild animals, not simple right of, 466.
Ordinary, moveables of intestate, go to, 570.
— administrator agent of, 572.
Ownership, not altered by pledge, 516.
— was originally corporate, 467, 549.
— transfer of, 460 sqq.
— relation between, and occupancy, 465.
— transfer of, not a contract, 470.
— necessary that it should be known, 471.
— publicity how secured, 473, 478.
— delivery why necessary, 474.
— why not always now, 476.
— still of great importance, 477.

Personal security, 501.
Physical identity of heir and ancestor, 552.
Pignus, 504.
— defects of the proceeding, 505.
— only gave personal security, 505.
— and hypotheca, identity of, 509.
Pledge, see Security.
— registration of, 478, 479.
— does not alter ownership, 516.
— voluntary and involuntary, 521.
— how extinguished, 524.
— priority of, 526.
— and lien, distinction between, 530.
Pledgee, could pledge over, 513.
— rights of, 516, 517.
— rights of, subsequent, 528.
— unauthorised sale by, 531.

Power of sale, 510.
— origin of it, 510.
— gave real security, 510, 534.
— extended to fiducia, 511.
— its great importance, 512.
— exercise of, by creditor, 519.
— when it exists in English law, 550.
— does not operate on interest of debtor, 534.
— of mortgagee, 537.
— how to be exercised, 538.
— on security of land, always exists, 537.
— not on security of moveables, 540.
— inconvenience of not having, 541.
Praedia, 510.
Priority among pledgees, 526.
Profits of pledge belong to pledgor, 517.
Public acts, what are, 480.
Publicity of transfer of ownership, how secured, 473, 478.
Purchase, did not always extinguish pledge, 525.
Purchasers, how protected by title-deeds, 485.
— how affected by notice, 487.

Real right, pledgee always has, 532.
— does not depend on his power of sale, 533.
Real security, 501.
— is given by power of sale, 510, 534.
Redemption, subsequent pledgee's right of, 528.
Registration, 478 sqq.
— in England a failure, 483.
— not in Ireland, 483.
— necessary to transfer moveables, 488.
— rules of, distinguished from rules of proof, 491.
— Indian law confounds them, 492.
— peculiarities of Indian law of, 492, 493.
Res nullius, acquisition of, rare, 466.
Roman law, imperfect knowledge of, in England, 498.
— of succession, not founded on a fiction, 553.

Sale, pledgee's power of, see Power of Sale.
Salvius, first recognised agreements for security, 507.
Savigny, his statement that testamentary succession founded on a fiction, 553.
Security, see Pledge.
— meaning of term, 496.
— English law of, derived from Roman, 497.
— not from best sources, 498.
— Story's knowledge of Roman law of, 498.
— statement of Roman law of, 500 sqq.
— how effected by *nexum* and *sponsio*, 500.
— personal, 501.
— real, 501.
— not always extinguished by sale, 525.
— by simple agreement, introduction of, 507.
— only one kind of, under Roman law, 522.
— may be given for any obligation, 514.
— English law of, 529 sqq.
— English law of, backward condition of, in Courts of Common Law, 530.
— unauthorised sale by holder of, 531.
—English law of, better dealt with in Courts of Chancery, 535.
Slaves, cultivation by, 506.
Specific property of pledgee, meaning of, 531.
Sponsio, 500.
Story, his knowledge of Roman law, 498.
— his error as to Roman law of security, 505.
Succession, 545 sqq.

Succession, meaning of the term, 546.
— how far based on fictions, 547.
— to corporate ownership, 550.
— to sole ownership, 551.
— notion of continuation of personal existence, 532.
— testamentary, not founded on a fiction, 553 sqq., 581.
— to moveables, 559 sqq.
— how far universal, 562.
— no privity between heir and ancestor, 564.
— liability to debts, 565.
— benefit of the inventory, 565 sqq.
— to immoveable property, 576.
— — testamentary, formerly unknown, 578.
— intestate to land, 582. See Intestate Succession.

Tacking, how far recognised by Roman law, 518.
Tenant, necessity for security by, 506.
— nature of security given by, 507.
Testamentary succession, not based on a fiction, 553 sqq.
— in India, 554, 557.
— error in supposing it to be a gift, 557 sqq.
— Blackstone ignorant of history of, 555.
— attacked by Mirabeau, 558.
— to land, formerly not known, 578.
— how established, 579.
Testamentary succession, not a fiction, 581.
Title, great expense of investigating, 487.
Title deeds, 485.
Transcription, 481.
Transfer of ownership, publicity of, how secured, 473, 478.
— of land, English law of, 484, 486.
— expense an impediment to, 487.
— when writing necessary, 489.

Universal succession to moveable estates, 562.
Universitas juris, explained, 548.
Uses, introduction of succession to land by doctrine of, 578.
— true nature of, 578.
— devise of, 580.
Uses of Roman law not our use, 578.

Vermögenswerth, meaning of term, 495 note.
Voluntary pledge, 521.
Voluntary transfer of ownership, 461.

Will, see Succession.
— creation of pledge by, 521.
— distinction between, and gift, 556.
— treated as a conveyance, 581.
— not a conveyance by a dead man, 581.
Wills, Statute of, 580.
Writing, when necessary on a transfer, 489.

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